82-1613

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

HELMERICH & PAYNE, INC.
Petitioner

v.

ROCK ISLAND IMPROVEMENT COMPANY
Respondent

v.

SAM SEXTON, JR.
Third Party Defendant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April, 1983

QUESTIONS PRESENTED

1. Whether the owner of real property leased for surface coal mining can recover in damages for breach of a reclamation provision of the coal mining lease $375,000.00, when counsel for the landowner stipulated at trial that full and complete reclamation of the land would increase its fair market value a total of $6,797.00, and that the surface of the land fully reclaimed would have a total fair market value of $76,345.00.

2. Whether the question of whether or not the rule of damages as set out in *Peevyhouse* v. *Garland Coal & Mining Company*, 382 P.2d 109 (Okl. 1962), is still the law of Oklahoma should be certified to the Oklahoma Supreme Court.

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the United States Court of Appeals for the Tenth Circuit are listed in the caption hereto. The parent corporation of Respondent, Rock Island Improvement Company, is Rock Island Railroad Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit entered January 21, 1983, is reported as *Rock Island Improvement Co.* v. *Helmerich & Payne, Inc.*, v. *Sam Sexton, Jr.*, ... F.2d ....., No. 81-1080 (10th Cir. 1983), and is set out as Appendix A hereto. The Order of the Court of Appeals for the Tenth Circuit denying Helmerich & Payne's Petition for Rehearing, Suggestion for Hearing En Banc, and Motion to Certify Question to the Oklahoma Supreme Court, dated February 23, 1983, is set out as Appendix B hereto.

There was no opinion in the District Court for the Eastern District of Oklahoma. The jury verdict and judgment of the District Court are set out as Appendices C and D hereto, respectively.

JURISDICTIONAL BASIS OF THIS PETITION FOR WRIT OF CERTIORARI

The Petitioner seeks, by Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, review of the final judgment of that court entered on January 21, 1983 (Appendix A, *infra*).

The Court of Appeals for the Tenth Circuit denied a Petition for Rehearing, Suggestion for Hearing En Banc, and Motion to Certify Question to the Oklahoma Supreme Court, on February 23, 1983 (Appendix B, *infra*). There has been no Order granting an extension of time within which to petition for certiorari.

Jurisdiction for this Court to review the judgment in question is believed to be conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 23 O.S. 1981 § 96, provides:

> Notwithstanding the provisions of this chapter[1], no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in cases where recovery may be for exemplary damages and penal damages, and in Sections 2871 and 2878.[2] R.L.1910, § 2889.
>
> [1]R.L.1910, ch. 24, now incorporated in this title.
>
> [2]Sections 40, 67 of this title.

Title 23 O.S. 1981 § 97, provides:

> Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. R.L.1910, § 2890.

Section 2871 referred to in § 96, *supra*, is codified at 23 O.S. 1981, § 40, which provides:

> The damages for the breach of a promise of marriage rest in the sound discretion of the jury. R.L. 1910, § 2871.

Section 2878 referred to in § 96, *supra*, is codified at 23 O.S. 1981 § 67, which provides:

> The damages for seduction rest in the sound discretion of the jury. R.L.1910, § 2878.

The 1971 Oklahoma Mining Lands Reclamation Act, 45 O.S. 1971 §§ 721-738, as it existed at all times pertinent hereto is set out in full as Appendix E hereto.

The decision of the Attorney General of the State of Oklahoma dated October 16, 1978, construing the 1971 Oklahoma Mining Lands Reclamation Act as applied to the land involved herein is set out as Appendix F hereto.

STATEMENT OF FACTS

April 8, 1968, Rock Island Improvement Company (hereinafter Rock Island) granted a Lease of Coal Deposits to Helmerich & Payne covering 5,205 acres for a term ending July 31, 1977, which provided for the lessee to pay yearly delay rentals of $5,204.93, together with ad valorem taxes, and providing in part in paragraph 3, page 1, in reference to reclamation:

> Upon the abandonment or completion of any mining operation, or part thereof, including but not limited to any strip operation, the surface shall be restored as nearly as possible to its condition prior to said mining operation, including the removal of any and

all such works, buildings, plants, structures and appliances placed thereon for said mining operation.

Helmerich & Payne did not mine any coal under the subject lease.

November 20, 1974, Helmerich & Payne entered into a Sublease and Agreement with Sam Sexton, Jr., giving him the right to mine coal as operator under the Subject Lease.

In early 1977, Billy R. Weiher, Assistant State Mine Inspector, reported, in reference to a portion of the leased land known as the Heavener pit (also known as Tract 1), that there were approximately 50 acres disturbed; and in reference to a portion of the leased land known as the Petros pit (also known as Tract 2), that there were approximately 45 acres disturbed; and that the operator "has continuaily made an effort to comply with the Oklahoma Mining Laws and to fulfill all recommendations in safety and reclamation made by an inspector of the Oklahoma Department of Mines."

July 31, 1977, the subject lease expired.

May 18, 1978, Oklahoma Department of Mines forfeited and obtained in cash the $50,000.00 bonds posted by the operator for reclaiming Tracts 1 and 2.

October 16, 1978, the Attorney General of the State of Oklahoma advised the Oklahoma Department of Mines by letter opinion (Appendix F, *infra*, at p. 3f) that the sole remedy for failure to complete the reclamation on Tracts 1 and 2 under the permits issued by the Oklahoma Department of Mines was the forfeiture of the performance bonds of $50,000.00 by the operator, which had previously occurred.

November 10-12, 1980, this case was tried before a jury in the United States District Court for the Eastern District of Oklahoma, at which time the Honorable Judge Frank H. Seay ruled that the measure of damages was governed by *Peevyhouse* v. *Garland Coal & Mining Co.*, 382 P.2d 109 (Okl. 1962), as the law of Oklahoma.

During trial the chief executive officer of Rock Island, Bruce E. Clinton, testified that in his opinion there could be remaining 750,000 to 1,000,000 mineable tons of coal under Tract 1, and that in 1976 and 1977 he had run two general advertisements soliciting bids from various coal companies to mine coal under the subject tracts.

During trial the attorney for Rock Island, David L. Russell, stipulated that the testimony of Otis Eversole, as set out in Defendant's Exhibits 81 and 82, regarding the value of the subject property, was true. Exhibits 81 and 82 are set out as Appendix G hereto. This stipulation provided that on July 31, 1977, with full and complete reclamation the surface of the "Rees-Heavener" tract (Tract 1) had a fair market value of $50,567.00, and the surface of the "Rees-Petros" tract (Tract 2) had a fair market value of $25,778.00. Thus, the total surface value of the subject tracts fully restored was stipulated by Rock Island to be $76,345.00. The diminution in value so stipulated to, occasioned by the failure to reclaim, was $6,797.00.

The jury returned a verdict against Helmerich & Payne in the amount of $375,000.00 as the cost of reclamation.

BASIS OF FEDERAL JURISDICTION

This controversy was tried to the United States District Court for the Eastern District of Oklahoma as a matter arising out of diversity of citizenship jurisdiction, with an amount in controversy of greater than $10,000.00, pursuant to 28 U.S.C. § 1332.

The final judgment of the District Court was appealed to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. §§ 1291, 1294.

REASONS FOR GRANTING THE WRIT

The principal issue in this controversy is the measure of damages suffered by a lessor of coal deposits upon the failure of the lessee to perform fully a reclamation provision of the lease subsequent to surface mining.

The Oklahoma Supreme Court addressed this identical issue in *Peevyhouse* v. *Garland Coal & Mining Company*, 382 P.2d 109 (Okl. 1962), holding:

> Syllabus by the Court
>
> Where, in a coal mining lease, lessee agreed to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties, except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; *however, where the contract provision which was breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly dis-*

proportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the nonperformance. (Emphasis added)

. . . .

23 O.S. 1961 §§ 96 and 97 provide as follows:

"§ 96. * * * Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides * * *.

"§ 97. * * * Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered."

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the "cost of performance" rule, plaintiffs might recover an amount about nine times the total value of their farm. Such would seem to be "unconscionable and grossly oppressive damages, contrary to substantial justice" within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the "cost of performance" rule, they will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96.

The law of Oklahoma, then, as set forth by its highest court, is clear. Upon the breach of a reclamation provision of a coal mining lease, the measure of damages is the dimi-

nution in value to the property where the cost of reclamation is grossly disproportionate to that disminished value and reclamation is incidental to the main purpose of the lease.

At the trial of this controversy, counsel for Rock Island stipulated to Helmerich & Payne's evidence that the diminution in value of the land in question by failure to reclaim was $6,797.00, and further that the total fair market surface value of the land fully reclaimed would be $76,345.00.

The Trial Court declined to interpret the unambiguous lease with respect to whether or not the reclamation provision was incidental to its main purpose. Instead, the interpretation of the lease was submitted to the jury, in the absence of any evidence regarding negotiation of the lease, and the circumstances and conditions existing when the lease was granted. Rock Island never alleged that the reclamation provision was a main purpose of the lease.

The Trial Court correctly instructed the jury that *Peevyhouse, supra,* accurately stated the law of Oklahoma. The jury returned a verdict in favor of Rock Island for $375,000.00 as the cost of reclaiming the land. The Trial Court denied timely motions for judgment notwithstanding the verdict, to amend the judgment, and for a new trial.

The Court of Appeals for the Tenth Circuit correctly found that the Trial Court erred in submitting the interpretation of the lease to the jury (Appendix A, *infra,* at p. 4a). Neither did the Court of Appeals question the stipulated fair market value nor diminution in value of the land.

Nonetheless, the Court of Appeals affirmed the jury's verdict on the grounds that *Peevyhouse, supra,* no longer states the law of Oklahoma. In so ruling, the Court of Appeals relied upon the 1971 Mining Lands Reclamation Act, 45 O.S. 1971 § 721, *et seq.* There have been some revisions in this Act since this action was commenced. The statute as originally enacted is set out at Appendix E, *infra.*

1. The History and Development of the Applicable Oklahoma Law of Damages.

A full appreciation of the Oklahoma law of damages which precludes the type of windfall recovery awarded in this action, and sanctioned by the Court of Appeals, is best imparted by chronologically setting out the pertinent Oklahoma authority. Contained within this chronology are citations of authority from other jurisdictions which have considered this matter and have followed the rule of *Peevyhouse, supra.*

August 27, 1890, the first Legislative Assembly of Oklahoma Territory set forth the law of Oklahoma with respect to damages for breach of contract as follows:

St. 1890, § 2656:

> Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in [the cases specified in the articles on exemplary damages and penal damages, and in Sections 2638, 2645 and 2646] *cases where recovery may be had for exemplary damages and penal damages, and in Sections 2871 and 2878.*

Now codified at 23 O.S. 1981 § 96, as originally enacted. The bracketed language was revised as underlined in 1910, Rev. L. 1910, § 2889.

St. 1890, § 2657:

> Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

Now codified at 23 O.S. 1981 § 97, as originally enacted.

From 1910 to the present date, the Oklahoma Legislature has not changed 23 O.S. §§ 96, 97, *supra*.

February 4, 1958, the Oklahoma Supreme Court held in *Gallaspy* v. *Warner*, 324 P.2d 848, 852-53 (Okl. 1958):

> Plaintiff in error contends that the judgment is in excess of the damage sustained by plaintiff and greater than he could have gained by the continued operation of the well. We think the contention must be sustained. Our attention is called to 23 O.S. 1951 § 96, which provides that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except where recovery may be for exemplary and penal damages. The statute is referred to and applied in Rucker v. Mason, 61 Okl. 270, 161 P. 195; Gilmore v. Battles, 193 Okl. 396, 144 P.2d 114; and Anderson v. Hodges, 187 Okl. 43, 100 P.2d 853. Anderson v. Hodges, supra, holds:
>
> > "In an action for the breach of a lease contract, the contract itself and the law applicable thereto must furnish the measure of damages, and the amount recovered cannot except in cases where recovery may be had for exemplary damages and

> penal damages, exceed the amount the plaintiff could have gained by a full performance of the the lease contract on both sides."

February 6, 1962, the Supreme Court of Oklahoma held in *Groendyke Transport, Inc.* v. *Merchant*, 380 P.2d 682, 686-87 (Okl. 1962):

> Syllabus by the Court
>
> 3. In action for breach of contract, the contract itself and the law applicable thereto must furnish the measure of damages, and the amount recovered cannot exceed amount plaintiff could have gained by full performance of contract on both sides except in cases where recovery may be had for exemplary and penal damages.

December 11, 1962, the Supreme Court of Oklahoma in *Peevyhouse* v. *Garland Coal & Mining Company, supra*, applied the above-quoted damage statutes to the breach of a reclamation provision of a coal mining lease.

January 7, 1964, the Oklahoma Supreme Court held in *Allied Hotels, Ltd.* v. *Barden*, 389 P.2d 968, 972-73 (Okl. 1964):

> In the second paragraph of the syllabus of Ellison v. Walker, Okl., 281 P.2d 931, we held:
>
> "The measure of damages to real property which are of a temporary character is the reasonable cost of repairing the damage or restoring the property to its former condition, *where, as herein, the cost of restoration or repairing is shown to be less than the fair value of the property before and after the injury* and the building can be restored to substantially the condition it was prior to the injury." (Emphasis added)

May 27, 1968, the Court of Appeals for the Seventh Circuit approved *Peevyhouse, supra,* in *Bowes* v. *Saks & Company,* 397 F.2d 113, 116-17 (7th Cir. 1968):

> Cost of repairs is merely a convenient way to quantify the damage a lessor has suffered. Where the facts indicate that cost of repairs is unrelated to lessor's actual damage, the rule is not applied. Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F.2d 687, 688 (2d Cir. 1926) (L. Hand, J.).
>
> "In an action for breach of contract, as opposed to a suit sounding in specific performance, the lessor is entitled only to the damages that were caused to the property by the failure to restore. Where the expense of restoration exceeds the diminution in the market value of the property caused by the lessee's nonperformance, the diminution in fair market value is the proper measure of damages." Dodge Street Building Corp. v. United States, 341 F.2d 641, 644, 169 Ct.Cl. 496 (1965). If the "cost of repair" rule will give lessors a greater benefit from the breach than could be gained from full performance, a different measure of damages must be applied to avoid injustice. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 113 (Okla. 1963). Accord, Giordano v. Brandywine Mushroom Corp., 32 Pa.Dist & Co. R.2d 522, 525-26 (1963). And see Realty Associates v. United States, 138 F.Supp. 875, 134 Ct.Cl. 167 (1956).
>
> The rule is analogous to the doctrine governing breach of construction contracts, most clearly stated by Judge Cardozo in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921). "The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value." 230 N.Y. at 244, 129 N.E. at 891. Accord, McCormick, Damages § 168. (Footnotes omitted)

January 17, 1972, the Court of Appeals for the Fourth Circuit held in *Associated Stations, Inc.* v. *Cedars Realty & Development Corp.*, 454 F.2d 184, 188 (4th Cir. 1972):

> In assessing damages, the district court used the "cost of restoration" standard. Damages were based on the amount it would have cost to restore the property to the condition it had been in when the property was leased to Cedars. This is the general rule for determining damages to leasehold property in Virginia. See Sharlin v. Neighborhood Theatre, Inc., 209 Va. 718, 167 S.E.2d 334 (1969); Vaughan v. Mayo Milling Co., 127 Va. 148, 102 S.E. 597 (1920); Moses v. Old Dominion Iron and Nail Works Co., 75 Va. 95 (1880). In none of these cases, however, was there any contention that the cost of restoring the property to its former condition greatly exceeded any benefit to the market value of the property. Cedars has made this very assertion — that the cost of repair does exceed any benefit to the value of the property — and thus we have no controlling Virginia ruling on this point.
>
> The object of damages in a contract case is to restore the plaintiff to the position he would have been in had the contract not been breached. The "cost of restoration" method is one convenient way of determining the amount of damages to be awarded the plaintiff where a breach had occurred. There are, however, certain situations where this method of computing damages does not restore the plaintiff to the position he would have been in had the contract not been breached, but rather places him in a better position, thus providing him with a windfall. In those cases courts have resorted to alternative methods of computing damages in order to insure that, as far as possible, the plaintiff neither loses nor benefits from the breach.

May 9, 1972, the Oklahoma Supreme Court cited *Peevyhouse, supra,* with approval, although finding it did not apply, in *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236, 1239 (Okl. 1972):

> Cities contends also that Western was required to utilize the damage theory which would result in the lowest damage estimate. In support Peevyhouse v. Garland Coal and Mining Company (Okl., 382 P.2d 109, 110) is cited. The claimed applicable language is: "* * * where the contract provision which was breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of nonperformance." In *Peevyhouse*, the lessee was required, upon the expiration of the coal mining lease to perform certain remedial work which was not done. To do the remedial work would have cost $29,000 with the result that the value of the premises would only be increased $300.00. We held only $300.00 could be recovered. Peevyhouse is not applicable. The efforts of Cities to defeat Western's application to abandon service to Cities, thus freeing Western's gas for a more lucrative market is more than incidental to the main purpose of the Contract.

In 1972 the Honorable Luther B. Eubanks, Judge for the United States District Court for the Western District of Oklahoma, ruled in *Hitchcock, infra,* that *Peevyhouse, supra,* was the law of Oklahoma.

June 19, 1973, the Tenth Circuit Court of Appeals, in a decision by Circuit Judge Seth, sitting on a panel with Circuit Judge Barrett and Senior District Judge Talbot

Smith, found that *Peevyhouse, supra,* accurately states the law of Oklahoma in *Hitchcock* v. *Peter Kiewit & Sons Company, Inc.,* 479 F.2d 1257 (10th Cir. 1973):

> At no time does it appear that the jury was told even though Peevyhouse was to be followed if applicable, it was their duty to determine whether the provisions relative to sloping the land and replacing the topsoil were "main" purposes of the contract here concerned, or merely "incidental." They were only told that if they found that the provisions were incidental, they were to apply the rule as to damages set forth in Peevyhouse. Thus the jury never decided this question. The court seemingly read Peevyhouse to them as having made that determination as a matter of law. The result of the injection of the state court opinion into the case as a direct instruction to the jury resulted inadvertently in taking from the jury the determination of whether or not the restoration of the land surface was incidental to the agreement or not. This is a fact question for the jury.
>
> A careful reading of the transcript convinces us that there was at least a strong probability that the jury thought that they were foreclosed from deciding this issue because of the Oklahoma Supreme Court's decision in Peevyhouse. Further remarks regarding the Peevyhouse rule and the instructions to the jury, adequate in themselves, were not clear enough and unequivocal enough to clear up the initial misdirection.

November 23, 1976, the Oklahoma Court of Appeals held in *Conkin* v. *Ruth,* 581 P.2d 923, 925 (Okl. App. 1976):

> The measure to be applied in compensatorily assessing "temporary" damage to realty arising out of the diversion of surface water flowage is the reasonable costs of repairing the damage, restoring the land to its prediversion state, or otherwise abating the det-

riment, *if such cost is less than the fair prediversion value of the property.* Allied Hotels, Ltd. v. Barden, Okl., 389 P.2d 968 (1964). If the damage is permanent, however, then the measure to be used is the difference between the value of the property before the diversion and its value afterward. Keck v. Bruster, Okl., 368 P.2d 1003 (1962). (Emphasis added)

Damage to realty is deemed to be permanent if irreparable, irremedial, or the remedial costs exceed the value of the property. Allied Hotels, Ltd. v. Barden, supra.

April 27, 1977, the United States Court of Claims found *Peevyhouse, supra,* controlling in *Missouri Baptist Hospital* v. *U. S.*, 555 F.2d 290, 294-95 (C.C. 1977):

The Government relies on cases such as Bowes v. Saks & Co., 397 F.2d 113 (7th Cir. 1968); Dodge Street Building Corp. v. United States, 341 F.2d 641, 169 Ct. Cl. 496 (1965); Spitzel v. United States, 146 Ct.Cl. 399 (1959); Realty Associates, Inc. v. United States, 138 F.Supp. 875, 134 Ct.Cl. 167 (1956); and Eaddy v. United States, 139 F.Supp. 49, 134 Ct.Cl. 338 (1956) to support its contention that the measure of damages for breach of a covenant to return the leased premises to the lessor in its original condition, is not the cost of repair where such cost exceeds the diminution in fair market value of the premises.

Plaintiff strenuously urges that these cases concern cost of restoration clauses and not cost of repair clauses; that costs to restore are not the same as costs to repair premises; and that a contrary rule should apply in repair cases. We disagree, and hold for defendant except with regard to its two counterclaims, which we deny pursuant to the trial judge's opinion, infra.

> The overall purpose of the aforementioned measure of damages rule, as we see it, is to avoid windfall recoveries.
>
> . . . .
>
> We hold that repair costs are subjected to a ceiling. That ceiling is the diminution in fair market value attributable to defendant's breach.

June 16, 1980, the Court of Appeals for the Sixth Circuit held in *Middendorf* v. *Fuqua Industries, Inc.*, 623 F.2d 13, 18-19 (6th Cir. 1980):

> A number of states follow the rule that where a landlord sues before the end of the term of a lease for breach of a covenant to repair, the measure of damages is the injury to the reversion rather than the cost of repairs. E.g., Tobin v. Union News Co., 18 A.D.2d 243, 239 N.Y.S.2d 22, 26 (N.Y.Sup.Ct.App.Div. 1963), aff'd, 13 N.Y.2d 1155, 247 N.Y.S.2d 385, 196 N.E. 2d 735 (1964); National Bank of Detroit v. Voight's Estate, 357 Mich. 647, 99 N.W.2d 504, 507 (1969); Corbett v. Derman Shoe Co., 338 Mass. 405, 155 N.E. 2d 423, 429 (1969); Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F.2d 687, 688 (2d Cir. 1926) (applying New York Law). See also Annot. 80 A.L.R. 2d 983, 987, 989 (1961).
>
> In actions by lessors for damage to leased premises in excess of ordinary wear and tear at the time of the surrender of the property, the Ohio rule was stated in Sopronyi v. Asztalos, 101 N.E.2d 161, 162 (Ohio App. 1949), as follows:
>
> > The measure of damages is the difference between the market value of the property would have had at the time of the surrender of possession by the defendant, if it had remained in the condition in which it was at the time possession was taken by the lessee, and its market value in the condition

> in which it was placed by the action of the defendant during the tenancy. Blosser v. Enderlin, 113 Ohio St. 121, 148 N.E. 393. The plaintiff is entitled to recover such amount as will fairly and reasonably compensate him for the damage done as provided by the terms of the lease. The cost of repairs may be admitted in evidence but only for the purpose of assisting in arriving at the fair and market value of the real estate at the times under consideration.

November 2, 1980, *Peevyhouse, supra,* was also applied in *Ruddach* v. *Don Johnston Ford, Inc.*, 621 P.2d 744-45 (Wash. App. 1980):

> A lessee who breaches a provision of the lease requiring him to make certain repairs or to deliver up the premises at the termination of the lease in a certain condition is liable in damages for the reasonable cost of making such repairs or of putting the premises in the condition prescribed by the lease.

Crystal Concrete Corp. v. Braintree, 309 Mass. 463, 470, 35 N.E.2d 672, 675 (1941).

> Cost of repairs is merely a convenient way to quantify the damages a lessor has suffered. Where the facts indicate that cost of repairs is unrelated to lessors' actual damage, the rule is not applied. Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F.2d 687, 688 (2d Cir. 1926) (L. Hand, J.).
>
> "In an action for breach of contract, as opposed to a suit sounding in specific performance, the lessor is entitled only to the damages that were caused to the property by the failure to restore. Where the expense of restoration exceeds the diminution in the market value of the property caused by the lessee's nonperformance, the diminution in

> fair market value is the proper measure of damages." Dodge Street Building Corp. v. United States, 341 F.2d 641, 644, 169 Ct.Cl. 496 (1965). If the "cost of repair" rule will give lessors a greater benefit from the breach than could be gained from full performance, a different measure of damages must be applied to avoid injustice. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 113 (Okl[a]. 1963). Accord, Giordano v. Brandywine Mushroom Corp., 32 Pa. Dist. & Co. [R.]2d 522, 525-26 (1963). And see Realty Associates v. United States, 138 F.Supp. 875, 134 Ct.Cl. 167 (1956).

Bowes v. *Saks & Co., supra* at 116-17.

This chronology of authorities makes clear that the rule of *Peevyhouse, supra,* is not an aberration subject to being discarded by a federal court sitting in diversity.

2. The *Peevyhouse* Rule Is Binding on the Federal Judiciary Sitting in Diversity.

Nearly fifty years ago, the United States Supreme Court ruled in *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 82 L.Ed. 1189 (1937), that federal courts are bound to follow state law with respect to substantive rights in actions arising from diversity jurisdiction. Further, the pronouncements of that law by the highest state court are afforded the greatest weight, and are controlling without regard to whether or not the federal courts agree with the result or with the grounds of such decisions. *Williams* v. *Kaiser,* 323 U.S. 471, 473, 89 L.Ed. 398, 401 (1944); *Meredith* v. *Winter Haven,* 320 U.S. 228, 234, 88 L.Ed. 9, 13 (1943); Federal Practice and Procedure, 32 Am.Jur.2d §§ 294, 295.

The Court of Appeals acknowledged the binding effect of state supreme court cases when it decided the case at bar, but stated further that "we need not adhere to a decision if we think it no longer would be followed." (Appendix A, *infra*, at p. 6a). As evidenced by *Meredith*, *supra*, a federal court may not deviate from state law unless it can point with assurance to further developments of state law which indicate that the previous decisions of the state's highest court will not be followed.

The authorities relied upon in Judge Logan's decision either involve an actual change in the statutory or case law of the state in question, or decline to deviate from the established state law.

McKenna v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 665 (3rd Cir. 1980), dealt with conflicting state supreme court decisions with respect to the applicable state statute of limitations for medical malpractice actions, and expressly found that the more recent state supreme court decision constituted an abandonment by that court of the doctrine set forth in its previous decision. *McKenna*, *supra*, did not involve a speculative determination of the current state law. The highest state court had spoken on the matter, and the question was concluded insofar as the federal court was concerned. A contrary result would have been surprising in view of the express finding of the court regarding the controlling nature of state supreme court decision, an expression omitted from the Court of Appeals' opinion in the instant case (Appendix A, *infra*, at p. 6a-7a), which omitted language provides at 622 F.2d 662:

> The primary source that must be analyzed of course, is the decisional law of the Ohio Supreme Court. In

> the absence of authority directly on point, decisions by that court in analogous cases provide useful indication of the court's probable disposition of a particular question of law.

Here there is no absence of authority directly on point. The Oklahoma Supreme Court has expressly applied to a coal mining lease damage statutes which have existed in Oklahoma since the nineteenth century. The Oklahoma coal mining statutes have no impact upon the contractual relationships between Helmerich & Payne and Rock Island. It simply cannot be said with any assurance that the Oklahoma Supreme Court would no longer apply these long-standing damage statutes to the present controversy.

Hood v. *Dunn & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), likewise does not logically support the court's radical deviation from the established Oklahoma law on damages. In *Hood, supra*, the court recognized that federal courts are not immutably bound to follow state court decisions, but found that the case before it failed the strict test applicable to such federal independent judgment on matters of state law. 486 F.2d 25. Likewise, there exists no compelling reason for the long-standing legislative policy of Oklahoma to be held for naught by the federal court.

Judge Logan's opinion further relies upon *Warner* v. *Gregory*, 415 F.2d 1345, 1347 (7th Cir. 1969), wherein the court determined that an actual change in the applicable state statute had occurred. Thus, the federal court was able to say with some assurance that case law construing the old statute would no longer be followed. That is not true of the present case, and the settled law of Oklahoma on damages should not be abrogated by the federal judiciary.

Finally, *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967), declined to speculate that state law had changed, finding that the *Erie* doctrine prevented such engagement in local law-making.

The gist of these authorities is not that a federal court must slavishly adhere to discarded state precedents. Nonetheless, the Oklahoma Supreme Court in *Peevyhouse, supra,* spoke directly and forcefully on the very dispositive issue of this action. There is no compelling reason to abandon the Oklahoma controlling authority, and it simply cannot be said with any assurance that the Oklahoma Supreme Court would do so if faced with this controversy.

3. The Oklahoma Mining Statutes Do Not Abrogate the *Peevyhouse* Rule.

The Oklahoma law of damages is clear. Damages must in all cases be reasonable. One may not recover more for the breach of a contract than he would have gained by full performance thereof, without regard to the agreement of the parties. Recovery for injury to real property cannot under these facts exceed the diminution in value caused by the breach, and cannot in any event exceed the fair market value of the property fully restored. By its opinion of January 21, 1983, the Court of Appeals has ruled that these basic and long-standing damage rules do not apply to reclamation under a coal mining lease due to the enactment of the 1971 Oklahoma Mining Lands Reclamation Act, *supra.*

Nonetheless, it cannot be said with any assurance that the Oklahoma Supreme Court would so hold. The mining statute relied upon was enacted on June 12, 1971, more

than three years after the parties hereto entered into the subject lease, and could not possibly have altered the obligations of these parties. Additionally, the 1971 Mining Lands Reclamation Act, *supra*, was enacted prior to the express findings of the Oklahoma Supreme Court in *Western Natural Gas, supra*, and the Oklahoma Court of Appeals in *Conkin, supra*, that *Peevyhouse, supra*, is the law of Oklahoma. That Act was also passed prior to the findings of the District Court and Court of Appeals in *Hitchcock, supra*, that *Peevyhouse, supra*, is the law of Oklahoma. Therefore, the conclusion of Justice Logan that the 1971 mining statute changed the law of *Peevyhouse, supra* (Appendix A, *infra*, at p. 6a-7a), is simply without support, and constitutes an impermissible deviation from the Oklahoma law controlling in this controversy.

However, assuming that the mining statute is applicable to a determination of the contractual rights of the parties, the critical factual issue in making that determination is whether or not the mining statute requires the reclamation upon which the damage award of $375,000.00 was based. The record herein is conclusive and unrebutted that no such reclamation is required.

The testimony of Rock Island's own expert witness, Don Westhoff, with respect to the cost of reclamation, and the work included in that cost, reveals that approximately 88 percent of the $375,000.00, or $40,000.00 to $45,000.00, was attributable to "closing the last cut," in other words, draining and filling the pit and knocking down the high wall. It is undisputed and of record, however, that the 1971 Oklahoma Mining Lands Reclamation Act, *supra*, does not require closing the last cut where mineable coal remains in the ground.

May 1, 1967, the Oklahoma Legislature passed the Open Cut Land Reclamation Act, Laws 1967, ch. 186, § 1, *et seq.* (codified at 45 O.S. Supp. 1968, §§ 701-713). This Act provided for reclamation and conservation of land disturbed by open cut mining *after mining operations are completed.* The obligation to reclaim after mining was completed was placed solely on the operator, and no obligation was placed on the landowner, lessor or lessee.

June 12, 1971, the State of Oklahoma adopted the Mining Lands Reclamation Act, Laws 1971, Ch. 332, § 1, *et seq.* (codified at 45 O.S. 1981 §§ 721, *et seq.*), which repealed the Open Cut Land Reclamation Act, *supra.* Like its predecessor, the 1971 Mining Lands Reclamation Act, *supra,* provides for reclamation and conservation of lands *after mining,* placing the sole obligation on the operator, and not upon the landowner, lessor or lessee. This Act (set out in full as Appendix E, *infra*) provides in § 725(d) as follows:

> (d) The operator may construct earth dams to form lakes in pits resulting from surface mining operations, provided that the formation of lakes shall not interfere with other mining operations or damage property of others.

Under the 1971 Oklahoma Mining Lands Reclamation Act, *supra,* the Oklahoma Mine Inspector put out Invitations to Bid on Reclamation Jobs which provided, in part:

> 3. Open pits will be leveled and graded unless otherwise specified for water reservoir.

The Oklahoma Department of Mines distributes a brochure printed in 1974 reflecting how coal miners are to make reclamation under the 1971 Mining Lands Reclama-

tion Act, *supra*; and which shows as reclaimed land that has mineable coal left, a high wall and a water reservoir, with the coal seam ("button") protected.

In fact, Rock Island admitted in its Brief of Appellee to the Court of Appeals that the reclamation upon which damages were based in this case was not required by the state mining statutes, Brief of Appellee, p. 13:

> State law does not in every case require the filling in of open pits which may have been formed — the lease did.

It should also be noted that the mining statutes place no obligation on the landowner, lessor or lessee, but place the sole obligation to reclaim upon the operator, 45 O.S. 1981 § 723(k), as was recognized by the Court of Appeals (Appendix A, *infra*, at p. 5a).

Further, counsel for Rock Island stipulated at trial that the sole remdey for the failure to reclaim pursuant to the statute is the forfeiture of performance bonds, in accordance with the opinion of the Oklahoma Attorney General (Appendix F, *infra*, at p. 3f). That sole remedy has already occurred in this matter.

Finally, assuming the mining statute had any application here, the Trial Court excluded all evidence offered by Helmerich & Payne that showed compliance with the policy of the statute as to flora, fauna and quality of water.

Simply stated, then, Oklahoma law does not under these circumstances allow Rock Island to recover more than the diminution in value to this land, and in no event can it recover more than the fair market value of the property in damages for failure to reclaim. Nonetheless, while pur-

porting to apply the 1971 Oklahoma Mining Lands Reclamation Act, *supra*, the Court of Appeals has imposed upon Helmerich & Payne an excessive penalty of cost of reclamation five times the value of the property, and which would increase the value of the surface by only $6,797.00, based upon reclamation that is not required by the Act. To apply the Oklahoma law of damages is not, as Judge Logan's opinion suggests, to assume that the reclamation cause of the lease was to have no force (Appendix A, *infra*, at p. 7a). There was never any question that the reclamation provision was fully effective, nor that Helmerich & Payne was liable to Rock Island for the breach of that provision. Nonetheless, the measure of damages for that breach as established by Oklahoma statute and the decisions of the Oklahoma Supreme Court is the diminution in value occasioned by the falure to reclaim, and cannot, in any event, exceed the fair market value of the property fully restored.

4. The Question of the Continuing Applicability of *Peevyhouse* Should Be Certified to the Oklahoma Supreme Court.

McKenna, supra, cited in Judge Logan's opinion, urges a determination of the applicable Oklahoma law at 622 F.2d 661 n. 15:

> It is regrettable that Ohio has not yet established a certification procedure that would enable this Court to obtain a definitive answer to the crucial question in this case from the Ohio Supreme Court. The United States Supreme Court has expressed its approval of such a procedure.

See also Lehman Bros. v. *Schein*, 416 U.S. 386, 390-91, 394-95, 94 S.Ct. 1741, 1743-44, 1745-46, 48 L.Ed.2d 215, 220 (1974).

Oklahoma has such a certification procedure, Uniform Certification of Question of Law Act, 20 O.S. 1981, § 1602. This Court should certify to the Oklahoma Supreme Court whether or not *Peevyhouse* is still the law of Oklahoma. It is true that no such request had been made in these proceedings prior to Helmerich & Payne's motion denied by the Court of Appeals February 23, 1983 (Appendix B, *infra*). However, the need or desirability of doing so was not an issue in this lawsuit until the Court of Appeals' decision of January 21, 1983, as at no time did the Trial Court rule, or even suggest, that *Peevyhouse* was no longer the law of Oklahoma. Helmerich & Payne does not believe that the Oklahoma Supreme Court would allow the recovery of damages for injury to real property which exceed by more than 490 percent the actual market value of that property. If the long-standing policy of the state is now to be cast aside, such a decision should be that of the Oklahoma Supreme Court, rather than a federal appeals court sitting in another state.

CONCLUSION

The elementary principles of damages, abandoned by the Court of Appeals herein, were espoused by no lesser jurists than Judge Cardozo in *Jacob & Youngs, Inc.* v. *Kent*, 230 N.Y. 239, 129 N.E. 889 (1921), quoted in *Bowes* v. *Saks & Company, supra;* and by Justice Learned Hand in *Pennsylvania Cement Co.* v. *Bradley Contracting Co.*, 11 F.2d 687 (2d Cir. 1926), quoted in *Ruddach, supra.* Yet, the Opinion of the Court of Appeals casts aside all authority in determining, for the State of Oklahoma, what its law with re-

spect to damages shall be. It is true that no individual's sacred liberties are here at stake, nor is any pressing Constitutional issue presented. Still, we are a country of laws, and wisdom may be found in the words of Justice White in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U.S. 429, 652, 39 L.Ed. 759, 844 (1895) (White, J., dissenting):

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great Constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

In ordering the affairs of their business and everyday lives, the citizens of Oklahoma have a right to rely upon the continuity of its laws. The Oklahoma Supreme Court recognized *Peevyhouse, supra,* as the law of Oklahoma after the 1971 Oklahoma Mining Lands Reclamation Act, *supra,* was enacted by the Legislature. Now, the Court of Appeals herein has usurped the right and duty of the Oklahoma courts by rejecting *Peevyhouse, supra.* The Court of Appeals rationalizes this result by noting that *Peevyhouse, supra,* contained a strong dissent (Appendix A, *infra,* at p. 6a). In fact, the Court of Appeals has done nothing other than set aside the reasoned and express opinion of the Oklahoma Supreme Court, and adopt for the State the minority view of the controlling decision by the State's highest

court. Such encroachment on local law-making was condemned in *Erie, supra,* and should not be allowed to stand.

The January 21, 1983 Opinion of the Court of Appeals does not cite a single case from anywhere in the United States, much less from Oklahoma, which has allowed such a windfall recovery. The damage award is grossly disproportionate to the benefit Rock Island would have gained by full performance, unreasonably excessive, and in no sense advances the interests of the people of the State of Oklahoma. If Rock Island had wished the land reclaimed, it could have sued for specific performance. *Bowes* v. *Saks & Co., supra.* Having sued for damages, it should be bound by state law as a limit on its recovery. Rock Island has neither the obligation nor the incentive to use the award to reclaim this land. In fact, the only evidence adduced at trial was that they did not intend to do so, but instead were seeking to lease it again for further mining of the substantial coal deposits remaining, as the highest and best use of the land.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in Rock Island Improvement Co. v. Helmerich & Payne, Inc., v. Sam Sexton, Jr.; No. 81-1080. In the event that the Petition is granted, Petitioner prays that the judgment of the Court of Appeals below be reversed, that the cause be remanded, and that the Court of Appeals be directed to render an Opinion in conformity with the findings of this Court. Additionally, should this Court find reason to believe that *Peevyhouse, supra,* may no longer be the

law of Oklahoma, Petitioner prays that the question be certified to the Oklahoma Supreme Court for such a determination.

Respectfully submitted,

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April, 1983

CERTIFICATE OF SERVICE

I, James R. Eagleton, a member of the Bar of the Supreme Court of the United States and counsel of record for Helmerich & Payne, Inc., Petitioner herein, hereby certify that on the ..... day of ....., 1983, pursuant to Rule 28 of the Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on each of the parties required to be served herein as follows:

On Rock Island Improvement Company, the Respondent herein, by mailing the copies in duly addressed envelopes, with first-class postage prepaid, to John R. Cain, counsel of record for Rock Island Improvement Company, at his office at 880 City National Bank Tower, Oklahoma City, Oklahoma 73102; and on Judge David L. Russell, counsel on brief for Rock Island Improvement Company, at his office at Federal Building, Oklahoma City, Oklahoma 73102.

On Sam Sexton, Jr., Third Party Defendant herein, by mailing the copies in a duly addressed envelope, with first-class postage prepaid, to Sam Sexton, Jr., appearing *pro se,* at his office at P.O. Box 1526, Fort Smith, Arkansas 72902.

All parties required to be served have been served.

James R. Eagleton
Counsel for Petitioner

APPENDIX A

PUBLISH

[Filed Jan. 21, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROCK ISLAND IMPROVEMENT COMPANY, Plaintiff-Appellee,	)	
v.	)	
HELMERICH & PAYNE, INCORPORATED, Defendant-Appellant Third Party Plaintiff,	)	No. 81-1080
v.	)	
SAM SEXTON, JR., Third Party Defendant.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D. C. No. 79-20-C)

James R. Eagleton (Marc F. Conley with him on the briefs), of Eagleton, Eagleton & Owens, Tulsa, Oklahoma, for Defendant-Appellant.

John R. Cain (David L. Russell of Benefield & Russell on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before BARRETT, McKAY, and LOGAN, Circuit Judges.

[APPENDIX]

LOGAN, Circuit Judge.

In this diversity case Helmerich & Payne, Inc. appeals a jury verdict in favor of Rock Island Improvement Company for breach of contract and appeals the trial court's denial of its motions for judgment nowithstanding the verdict and for a new trial or amendment of the judgment.

From 1968 to 1977 Hemerich & Payne leased two tracts of land in Oklahoma from Rock Island for coal mining purposes. These tracts are referred to as the "Rees-Heavener" and "Rees-Petros" mines. The lease contained a reclamation clause that stated: "Upon the abandonment of completion of any mining operation, or part thereof, including but not limited to any strip operation, the surface shall be restored as nearly as possible to its condition prior to said mining operation . . . ." Helmerich & Payne subleased the land to Sam Sexton, Jr., who used stripmining techniques to remove substantial amounts of coal. When the lease period ended, the tracts were left with two strip pits and were not otherwise reclaimed to Rock Island's satisfaction. Rock Island sued Helmerich & Payne for breach of the lease's reclamation provision, seeking damages equal to the amount necessary to reclaim the land. Helmerich & Payne filed a third party complaint against Sexton, who agreed to pay any judgment won by Rock Island. The jury awarded Rock Island $375,000.

On appeal the issues may be classified under the following headings: (1) the applicable Oklahoma damages law, (2) the admissibility of testimony by Rock Island's experts, (3) the excessiveness of the damages, (4) the fairness of the trial, (5) the assessment of damages for land that the State of Oklahoma had condemned, and (6) the crediting against the judgment, as stipulated by the parties, of $50,000 that Sexton had forfeited to Oklahoma.

I

Helmerich & Payne contends that the trial court improperly applied Oklahoma damages law. In instructing

the jury on damages,[1] the trial court relied on *Peevyhouse* v. *Garland Coal & Mining Company*, 382 P.2d 109 (Okla.), *cert. denied*, 375 U.S. 906 (1963). In *Peevyhouse* the Oklahoma Supreme Court examined a coal mining lease requiring the lessee to reclaim any land it stripmined. At issue was whether the proper measure of damages for the lessee's failure to reclaim was the cost of performance ($29,000) or the diminution in the fair market value of the land ($300). The court held that the proper measure of damages was the reasonable cost of reclamation, unless the reclamation requirement was incidental to the lease's main purpose and the cost of reclamation would be grossly disproportionate to the diminution in the land's fair market value. In the latter case, the lessor's damages were limited to the diminution in value. *Id.* at 114.

In the instant case the trial court submitted the issue of the reclamation clause's importance to the jury. We have held that a trial court must submit this issue to the jury when the parties have introduced extrinsic evidence of their intent, *Hitchcock* v. *Peter Kiewit & Sons Co.*, 479 F.2d 1257 (10th Cir. 1973); otherwise, the trial court should treat interpretation of the contract clause as a matter of law. *See Walker* v. *Telex Corp.*, 583 P.2d 482, 485 (Okla.

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[1] The trial court instructed the jury as follows:

"The measure of damages is the reasonable cost of performing the contract, or in this case, restoring the land to the same condition it was in before stripmining, unless you find:

1. That the lease provision requiring restoration of Plaintiff's land to the same condition it was in before stripmining was merely incidental to the main purpose of the lease; and
2. That the economic benefit to the Plaintiff by restoring the land would be grossly disproportionate to the cost of restoring the land.

"Then, if you so find, the amount of damages to which Plaintiff is entitled is the reduced value of Plaintiff's land, that is, the difference between the present fair market value of the land as it is, and the present fair market value of the land restored to the same condition it was in before the stripmining."

1978). Neither Rock Island nor Helmerich & Payne introduced evidence establishing the parties' intent in including the restoration clause.[2] Therefore, the trial court should not have submitted interpretation of the contract to the jury.

Helmerich & Payne asserts the trial court should have held that the lease unambiguously focused upon coal mining as its main purpose and that reclamation was merely an incidental purpose. Furthermore, Helmerich & Payne argues that because the parties stipulated the diminution in value of the land was $6,797, and the evidence presented showed that restoring the land would cost $375,000, the court should have held the cost of reclamation was disproportionate to the diminution in land value. Thus, following *Peevyhouse*, the proper measure of damages would be diminution in market value, an amount the parties stipulated, and thus not a jury issue. Rock Island's response is that *Peevyhouse* no longer represents Oklahoma law on damages for breach of mining contracts because of subsequent developments in that state's policy toward reclamation.

At the time the parties in *Peevyhouse* entered into their lease, Oklahoma had no stated policy concerning land reclamation after mining operations. Thus, in *Peevyhouse* the court considered only the economic benefits to the parties of a situation the court termed "artificial," "un-

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[2] Helmerich & Payne attempted to introduce a letter it had received from an agent of Rock Island's parent corporation one year before the lease became effective, as relating to the issue of Rock Island's understanding of the meaning of the reclamation clause. The trial court excluded the letter as not clearly relating to the contract in question and as being potentially confusing to the jury. Helmerich & Payne asserts that the trial court erred in excluding this letter as extrinsic evidence. Rulings regarding the admission of evidence fall within the trial court's discretion and will not be disturbed on appeal unless clearly erroneous. *Keen* v. *Detroit Diesel Allison*, 569 F.2d 547, 549 (10th Cir. 1978). We have read the letter and have determined that the trial court did not abuse its discretion.

reasonable," and "unrealistic": that a property owner would agree to pay a great deal for "improvements" that would increase the property's value by only a small amount. The court was concerned that if the landowner did not spend the large amount to reclaim the land, he would receive a windfall by recovering the amount from the lessee. 382 P.2d at 112.

However, after the decision in *Peevyhouse* but before Rock Island leased the tracts to Helmerich & Payne, Oklahoma enacted the Open Cut Land Reclamation Act. 1967 Okla. Sess. Laws Ch. 186 (current version at Okla. Stat. Ann. tit 45, §§ 721-792). The Act stated in part:

> "It is hereby declared to be the policy of this State to provide, after mining operations are completed, for the reclamation and conservation of land subjected to surface disturbance by open cut mining and thereby to preserve natural resources, to aid in the protection of wildlife and aquatic resources, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, and to protect and promote the health, safety and general welfare of the people of this State."

Id. at § 2 (current version at Okla. Stat. Ann. tit 45, § 722).

The statute declares today, as it did in 1967, that the operator of a strip mine has a duty to reclaim the land and that the state may contract for the work to be done if the operator defaults. The statute makes no exception for cases in which the expenditures for reclamation are disproportionate to the resulting increase in value of the land. To be sure the statute looks to the operator as the party responsible for reclamation, and limits the state's recovery to the amount of the bond it has required.[3] Nevertheless,

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[3] At the time of the Rock Island-Helmerich & Payne contract the maximum bond required was $50 per acre. Today there is no maximum; the bond must cover the estimated reclamation costs. Okla. Stat. Ann. tit 45, § 728(B).

there are many reasons a landowner in Rock Island's position would want a reclamation provision in the lease — to enhance its image in the community, to protect against possible tort liability for conditions on its premises, and to allay any fear that under the recently enacted law it might somehow be held responsible for defaults of the operator. There are reasons a lessee might readily accept such a provision — it already has a duty to reclaim under the state statute.

We are convinced that the Oklahoma Supreme Court would no longer apply the rule it established in *Peevyhouse* in 1963 if it had the instant dispute before it. *Peevyhouse* was a 5-4 decision with a strong dissent.[4] More importantly, the public policy of the state has changed, as expressed in its statutes. Although we are bound by decisions of a state supreme court in diversity cases, we need not adhere to a decision if we think it no longer would be followed.

> "An accurate forecast of [a state's] law, as it would be expressed by its highest court, requires an examination of all relevant sources of that state's law in order to isolate those factors that would inform its decision. . . . It is important to note, however, that our prediction 'cannot be the product of a mere recitation of previously decided cases.' In determining state law, a federal tribunal should be careful to avoid the 'danger' of giving 'a state court decision a more binding effect than would a court of that state under similar circumstances.' Rather, relevant state precedents must be scrutinized with an eye toward the

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[4] *Peevyhouse* has been cited in only two Oklahoma Supreme Court cases. In *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236, 1249 (Okla.), *cert. denied*, 409 U.S. 1052 (1972), it was held to be inapplicable to the facts before the court. In *State ex rel. Cartwright* v. *Dunbar*, 618 P.2d 900, 911 (Okla. 1980), its supplemental opinion on rehearing was cited for an unrelated point of constitutional law.

broad policies that informed those adjudications, and to the doctrinal trends which they evince."

McKenna v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). *Accord Hood* v. *Dun & Bradstreet, Inc.*, 486 F.2d 25, 31 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Warner* v. *Gregory*, 415 F.2d 1345, 1346 (7th Cir. 1969), *cert. dismissed*, 397 U.S. 930 (1970); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (2d Cir. 1967). When the parties negotiated the contract in question, they expressly included a reclamation clause and required the lessee to bear the cost of reclamation. Given the attention focused by Oklahoma on the importance of reclaiming stripmined lands, it is more logical to assume that the parties meant what they said, calculated their costs and benefits under the contract accordingly, and intended the provision to insure proper reclamation of the land, than it is to assume that they expected the reclamation clause to have no force.[5]

Even though the trial court should not have submitted the issue of the reclamation clause's importance to the jury, we need not reverse. Because we hold that cost of performance is the proper measure of damages, and the jury used this measure in calculating damages, the court's error is harmless.

II

The trial court denied Helmerich & Payne's motion to strike Rock Island's expert witness' testimony that the cost of restoring the land as nearly as possible to its original

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[5] In *Peevyhouse* the court relied in part on Oklahoma damages statutes requiring that a party receive no more in damages than it would have gained by full performance. See 382 P.2d at 113 (citing Okla. Stat. Ann. tit. 23, §§ 96, 97). Helmerich & Payne contends that these statutes limit the amount of its damages. Because the anticipated cost of reclamation may have affected the contract price, these damages statutes do not preclude use of the cost-of-performance measure of damages.

condition would be $375,000. Helmerich & Payne claims that the expert's testimony should have been disregarded because on cross-examination the expert inadequately disclosed the underlying facts for his opinion. *See* Fed R. Evid. 705. Specifically, it complains that the expert did not know how many acres would be reclaimed under his estimate. Although the expert admitted he could only guess the number of acres to be reclaimed, he testified that he had measured the strip pits in feet to calculate his estimate and that when the pits were filled the spoils areas (hills of surface material that had been removed to gain access to the coal) would have been graded and leveled. Since the bulk of the expert's estimate concerned filling the pits, the total number of acres involved was a minor element in figuring the cost of reclamation. He testified that his reclamation estimate included filling in the pits, grading and leveling the spoils, and revegetating. The expert also testified about his prior experience in reclaiming mined lands. Based upon these disclosures, we cannot find that the trial court erred in denying the motion to strike.

Helmerich & Payne also maintains that the expert's estimate cannot support the verdict because it included work that was not required by the lease: filling the pit on the Rees-Heavener tract and grading and leveling the Rees-Petros tract.[6] Helmerich & Payne asserts that the lease did not require filling the pit on the Rees-Heavener tract because Sexton had fulfilled Helmerich & Payne's duty to restore the surface by reclaiming another pit and spoils area on the same tract that had been left over from previous

[6] Additionally, Helmerich & Payne asserts that the expert included this work in his estimate because of an erroneous interpretation of state law given him by the Oklahoma Deputy Chief Mine Inspector. Because Rock Island sought recovery only for breach of the lease reclamation clause, the state law requirements are irrelevant here. We have read the expert's testimony and find that it is consistent with the scope of the lease reclamation clause.

mining. Furthermore, Helmerich & Payne maintains that Sexton had already graded and leveled the Rees-Petros tract as nearly as possible to its prior condition.

In assessing damages the jury could properly consider Rock Island's expert's estimate, which included filling and grading the new pit on the Rees-Heavener tract and restoring the Rees-Petros tract. The lease stated, "[T]he surface shall be restored as nearly as possible to its condition prior to [the] mining operation." The extent and cost of restoration required by the lease was the heart of this litigation, and the lease arguably required the work Rock Island's expert included in his estimate. Although Helmerich & Payne had no duty under the lease to reclaim the previously mined area, nothing in the lease indicates that it could fulfill its duty to reclaim the surface area it disturbed on a tract by reclaiming a different part of the tract. Helmerich & Payne neither sought restitution for reclaiming the previously mined area nor submitted evidence of the cost of that reclamation. Similarly, the expert's opinion that $25,000 would pay for leveling and grading the Rees-Petros tract related to the parties' dispute over how much restoration that tract required.

III

Helmerich & Payne contends that reasonable damages fall in the range of $40,000 to $65,000 for regrading the spoils area and that the $375,000 verdict, which included regrading and filling the strip pits, was excessive. Helmerich & Payne argues that in these circumstances the court should have ordered a new trial. In reviewing a trial court's refusal to grant a motion for a new trial because of an excessive verdict, we apply the abuse of discretion standard. *Garrick* v. *City and County of Denver*, 652 F.2d 969, 971 (10th Cir. 1981). We cannot say that the jury or trial court erred by interpreting the reclamation clause to include filling the pits. Furthermore, because testimony of Rock Island's expert witness supports the $375,000 verdict, the trial court did not abuse its discretion in denying the motion.

IV

Helmerich & Payne raises a number of complaints concerning evidentiary rulings and instructions that it contends rendered the trial unfair. It claims that the court improperly instructed the jury on Helmerich & Payne's obligation to reclaim the land under the lease. The trial court instructed the jury that the lease required Helmerich & Payne to restore the surface of Rock Island's land "to the same condition it was in before the coal was strip mined." The lease required restoration of the surface "as nearly as possible to its condition prior to [the] mining operation." The pretrial order included as an issue for trial, "Is it reasonably possible to restore the surface of subject real property to the condition it was on April 8, 1968, and the cost thereof." Helmerich & Payne claims error in the instruction's omissions of the lease language "as nearly as possible" and of the pretrial language of a "reasonable" possibility of restoration. Helmerich & Payne concedes that restoration is possible, but asserts that it agreed to restore the land only as nearly as possible or as reasonably possible and that spending $375,000 to restore land whose value will thereby be increased by less than $7,000 is not reasonably possible. Helmerich & Payne is merely rearguing the proper measure of damages, an issue we have already resolved against it.

Helmerich & Payne correctly argues that the trial court erred in instructing the jury on the diminution in value of the land by focusing on the land's value at the time the jury was deciding the issue, rather than on its value at the end of the lease term. However, the error was harmless because we have already determined that the cost of reclaiming the land was the proper measure of damages.

Helmerich & Payne also alleges that the trial court erred (1) in excluding extrinsic evidence of the reclamation clause's meaning, testimony concerning lease payments to Rock Island, land records whereby Rock Island acquired the land it leased to Helmerich & Payne, and evidence of the land's present condition; (2) in admitting the sublease reclamation provision and Sexton's applications to the Okla-

homa Department of Mines for mining permits; (3) in instructing the jury on the Oklahoma reclamation statutes and on waiver and estoppel; and (4) in permitting certain testimony of witnesses and certain statements of counsel. Finally, Helmerich & Payne maintains that the errors collectively deprived it of a fair trial. After reading the record and considering Helmerich & Payne's contentions separately and collectively, we conclude that the trial was fair and that the trial court committed no error justifying reversal.

V

Helmerich & Payne contends that the trial court should have granted its motion to amend the pretrial order to permit adding the issue whether Rock Island could recover damages for land condemned by Oklahoma. Helmerich & Payne sought to add this issue less than one month before trial. From the record it appears that Oklahoma filed an action on February 22, 1974 to condemn 13.35 acres of the land at issue in this lawsuit. By the time of trial the state apparently had not taken possession, although on May 1, 1974, the state paid into court an amount covering assessed value and costs. The Helmerich & Payne attorney who signed the motion and supporting memorandum stated he had had no knowledge of the condemnation action before October 10, 1980. Sexton did not indicate whether he was aware of the condemnation, but he supported the motion, claiming Rock Island should not recover for damage to land it did not own. Rock Island opposed the motion asserting that the motion raised a new issue on the eve of trial, that both Helmerich & Payne and Sexton were aware of the condemnation proceedings and were involved in negotiations with the condemnor, and that the condemnation proceedings were irrelevant because they had never been completed, negotiations were ongoing, and Rock Island still held legal title to the land. The trial judge gave no reason for denying the motion to amend.

A pretrial order controls the subsequent course of the suit unless the trial court modifies it to prevent manifest

injustice. *See Seneca Nursing Home* v. *Secretary of Social and Rehabilitation Services of Kansas*, 604 F.2d 1309, 1314 (10th Cir. 1979); Fed. R. Civ. P. 16. Here the trial court's refusal to modify the pretrial order did not create manifest injustice. In *Epperson* v. *Johnson*, 190 Okla. 1, 119 P.2d 818 (1941), an Oklahoma condemnor filed condemnation proceedings and paid the commissioners' assessment into court. Applying constitutional and statutory provisions substantially similar to those applicable to the condemnation of the Rock Island property, the Oklahoma Supreme Court found that the condemnor did not take title to the property simply by paying the commissioners' award into court. 119 P.2d at 823; *accord Board of Commissioners* v. *Rayburn*, 192 Okla. 694, 138 P.2d 820, 822 (1943); *State ex rel. Department of Highways* v. *Waters*, 376 P.2d 288, 290-91 (Okla. 1962); *Oklahoma Turnpike Authority* v. *Dye*, 208 Okla. 396, 256 P.2d 438, 441-42 (1953). In the case before us, Helmerich & Payne does not contend that the state took possession of the land. To the contrary, after the condemnation was filed, Helmerich & Payne subleased this land, received royalties from the sublessee for mining coal on the land, and paid Rock Island royalties for coal. Accordingly, the trial judge did not prejudice Helmerich & Payne by denying its motion to amend the pretrial order.

VI

Finally, Helmerich & Payne contends that the trial court erred in failing to amend the judgment to give credit for Sexton's forfeiture to Oklahoma of $50,000 in performance bonds. The parties stipulated at pretrial that Helmerich & Payne would be credited in this amount and reaffirmed the stipulation in the briefs on appeal and at oral argument. The trial court should have amended the judgment to reflect the stipulation.

Subject to the modification of $50,000 credited to Helmerich & Payne as stipulated by the parties, the judgment is AFFIRMED.

APPENDIX B

JANUARY TERM — February 23, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

ROCK ISLAND IMPROVEMENT CO.,	)	
Plaintiff-Appellee,	)	
vs.	)	
HELMERICH & PAYNE, INC.,	)	No. 81-1080
Defendant-3rd Party	)	
Plaintiff-Appellant,	)	
vs.	)	
SAM SEXTON, JR.,	)	
Third-Party Defendant	)	

This matter comes on for consideration on appellant's petition for rehearing and suggestion for rehearing in banc, and the motion to certify question to the Oklahoma Supreme Court.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

The motion to certify question to the Oklahoma Supreme Court is denied.

HOWARD K. PHILLIPS, Clerk
By (s) *Robert L. Hoecker*
Chief Deputy Clerk

APPENDIX C

[Filed Nov. 12, 1980]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

ROCK ISLAND IMPROVEMENT CO.,
Plaintiff,
-vs-
HELMERICH AND PAYNE, INC.,
Defendant,
-vs-
HELMERICH AND PAYNE, INC.,
Third-Party Plaintiff,
-vs-
SAM SEXTON, JR.,
Third-Party Defendant.

No. 79-20-C

We, the Jury, duly empaneled and sworn, upon our oaths, find in favor of the plaintiff, Rock Island Improvement Co., and against the defendant, Helmerich and Payne, Inc., and assess recovery for plaintiff at $375,000.

11-12 , 1980 (s) *Ronald S. Price*
(Date) (Foreman)

APPENDIX D

[Filed Nov. 12, 1980]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 79-20-C

ROCK ISLAND IMPROVEMENT CO., (Plaintiff) vs. HELMERICH & PAYNE, INC. (Defendant & Third Party Pltf.) vs. SAM SEXTON, JR. (Third Party Defendant)	JUDGMENT

This action came on for trial before the Court and a jury, Honorable Frank H. Seay, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Plaintiff, Rock Island Improvement Co., recover of the Defendant, Helmerich & Payne, Inc., the sum of $375,000.00.

It is further Ordered and Adjudged that Third Party Plaintiff, Helmerich & Payne, Inc., recover of the Third Party Defendant, Sam Sexton, Jr., the sum of $375,000.00.

Dated at Muskogee, Oklahoma, this 12 day of November, 1980.

(s) *Lewis Vaughn*
Clerk of Court

APPENDIX E

45 O.S. 1971 § 721, *et seq.*
THE MINING LANDS RECLAMATION ACT

§ 721. *Short title*

This act may be known and cited as "The Mining Lands Reclamation Act".

§ 722. *Declaration of policy*

It is hereby declared to be the policy of this state to provide for the reclamation and conservation of land subjected to surface disturbance by mining and thereby to preserve natural resources, to encourage the productive use of such lands after mining, to aid in the protection of wildlife and aquatic resources, to encourage the planting of trees, grasses and other vegetation, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, to aid in the prevention of erosion, landslides, floods and the pollution of waters and air, to protect the natural beauty and aesthetic values in the affected areas of this state, and to protect and promote the health, safety and general welfare of the people of this state.

§ 723. *Definitions*

Whenever used or referred to in this act, unless a different meaning clearly appears from the context:

(a) "Overburden" means all of the earth and other materials which lie above natural deposits of minerals, and also means such earth and other materials disturbed from their natural state in the process of surface mining.

(b) "Mine" means an underground or surface excavation and development with or without shafts, slopes, drifts or tunnels for the extraction of minerals, with hoisting or haulage equipment and appliances for the extraction thereof, and shall embrace any and all of the land or

property of the plant, and the surface and underground, that contribute directly or indirectly to the Mining properties, concentration or handling of minerals.

(c) "Mining" means the extraction of minerals from natural deposits by any method or process.

(d) "Minerals" means asphalt, clay, coal, copper, granite, gravel, gypsum, lead, marble, salt, sand, shale, stone, tripoli, volcanic ash and zinc, or any other substance commonly recognized as a mineral, and includes ores or rock containing any such substances, but excludes oil, gas and any other mineral found naturally in a liquid or gaseous state.

(e) "Underground mining" means those mining operations carried out beneath the surface by means of shafts, slopes, tunnels or other openings leading to the mineral being mined and the extraction of the mineral through such shafts, slopes, tunnels or their openings.

(f) "Surface mining" means those mining operations carried out on the surface, including strip mining, auger mining, quarrying, dredging, pumping, or the use of hydraulic methods. Surface mining shall not include excavation or removal of shale, sand, gravel, clay, rock or other materials in remote areas by an owner or holder of a possessory interest in land for the primary purpose of construction or maintenance of access roads to or on such landowner's property. Surface mining shall not include excavations or grading conducted for forming, on-site road construction or other on-site construction, or the extraction of minerals other than anthracite and bituminous coal by a landowner for his own noncommercial use from land owned or leased by him; nor the extraction of such non-coal minerals for commercial purposes in an amount less than five hundred (500) tons per acre of aggregate or mass of mineral matter in any permit year; nor the extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes, so long as such work is per-

formed under a bond, contract and specifications which substantially provide for and require reclamation of the area affected in the manner provided by this act; nor to the handling, processing or storage of slag on the premises of a manufacturer as a part of the manufacturing process.

(g) "Strip mining" means those mining operations carried out by removing the overburden lying above natural deposits of minerals, and mining directly from such natural deposits thereby exposed, but excludes auger mining, quarrying, dredging, pumping or the use of hydraulic methods.

(h) "Reclamation" means conditioning affected land to make it suitable for any uses or purposes consistent with those enumerated in 45 O.S.1971, § 722, and to avoid, minimize or correct adverse environmental effects of mining operations.

(i) "Box cut" means the first open cut in strip mining which results in the placing of overburden on unmined land adjacent to the initial pit and outside the area to be mined.

(j) "Consolidated material" means material of sufficient hardness or ability to resist weathering and to inhibit erosion or sloughing.

(k) "Operator" means any person, partnership, firm or corporation engaged in and controlling a mining operation.

(l) "Pit" means a tract of land from which overburden or minerals have been or are being removed in the process of surface mining.

(m) "Affected land" means the area of land from which overburden shall have been removed, or upon which overburden or refuse has been deposited, or both.

(n) "Refuse" means all waste material directly connected with the production, cleaning or preparation of minerals which have been mined by either underground or surface mining method.

(o) "Ridge" means a lengthened elevation of overburden created in the surface mining process.

(p) "Peak" means a projecting point of overburden created in the surface mining process.

(q) "Department" means the office of the Chief Mine Inspector, herein called the Department of Mines and Mining, or such department, bureau or commission as may lawfully succeed to the powers and duties of such department.

(r) "Director" means the Chief Mine Inspector of the State of Oklahoma or such officer, bureau or commission as may lawfully succeed to the powers and duties of such Chief Mine Inspector.

§ 724. *Permits — Application — Bond*

(a) It shall be unlawful for any operator to engage in any mining operations in this state without first obtaining from the Department a permit to do so for each separate mining operation in such form as is hereinafter provided. The Department shall determine what constitutes a separate mining operation by rules and regulations promulgated under this act.

(b) Any operator desiring to engage in surface mining shall make written application to the Department for a permit. Application for such permit shall be made upon a form furnished by the Department, which form shall contain a description of the tract or tracts of land and the estimated number of acres thereof to be affected by surface mining by the operator until the next succeeding June 30, which description shall include the section, township, range and county in which the land is located and shall otherwise describe the land with sufficient certainty so that it may be located and distinguished from other lands, and a statement that the operator has the right and power by legal estate owned to mine by surface mining the land so described.

(c) Any operator desiring to engage in underground mining shall make written application to the Department for a permit. Application for such permit shall be made upon a form furnished by the Department, which form shall contain a description of the tract or tracts of land to be used as refuse disposal areas until the next succeeding June 30, which description shall include the section, township, range and county in which the land is located and shall otherwise describe the land with sufficient certainty so that it may be located and distinguished from other lands, and a statement that the applicant has the right and power by legal estate owned to use the land so described as a refuse disposal area.

(d) Each application for a permit under subsections (b) and (c) of this section shall be accompanied by a plan of reclamation of the affected land that meets the requirements of this act, and shall set forth the proposed use to be made of the affected land, the grading to be accomplished, the type of revegetation, and shall include the approximate time of grading and initial revegetation effort.

(e) Each application for a permit under subsections (b) and (c) of this section shall be accompanied by the bond or security meeting the requirements of Section 8 of this act, or proof that such bond or security is still in effect, and a fee of Fifty Dollars ($50.00), which shall be deposited in the General Revenue Fund of the State Treasury.

(f) Upon the receipt of such application, bond or security and fee due from the operator, the Department shall issue a permit to the applicant which shall entitle him to engage thereafter in mining on the land therein described until the next succeeding June 30, the period for which such permits are issued being hereafter referred to as the "permit year". Except in the case of permits for new mining operations commenced after the effective date of this act, all applications for permits shall be filed between June 1 and June 30 of each year.

(g) An operator desiring to have his permit amended to cover additional land may file an amended application with the Department. Upon receipt of the amended application, and such additional bond as may be required under the provisions of this act, the Department shall issue an amendment to the original permit covering the additional land described in the amended application, without the payment of any additional fee.

(h) An operator may withdraw any land covered by a permit, deleting affected land therefrom, by notifying the Department thereof, in which case the penalty of the bond or security filed by such operator pursuant to the provisions of this act shall be reduced proportionately.

(i) Permits issued hereunder to an operator shall not be transferable to another operator.

§ 725. *Procedure for reclaiming land*

(a) All affected land other than lands affected by coal mining operations shall be reclaimed as provided in this section.

(b) The operator shall determine which parts of the affected land shall be reclaimed for forest, pasture, crop, horticultural, homesite, recreational, industrial or other use including food, shelter and ground cover for wildlife.

(c) All ridges and peaks of overburden created by surface mining shall be graded to a rolling topography traversable by machines or equipment customarily used in connection with the use to be made of the land after reclamation, but such slopes need not be reduced to less than the original grade of the area prior to mining, and the slope of the ridge of overburden resulting from a box cut need not be reduced to less than twenty-five (25) degrees from horizontal. Surface mining operations conducted in the flood plains of streams and rivers and subject to periodic flooding shall be exempt from the grading requirements of this section.

(d) The operator may construct earth dams to form lakes in pits resulting from surface mining operations, provided that the formation of lakes shall not interfer with other mining operations or damage property of others.

(e) The operator shall cover the exposed face of a mineral seam, where significant concentrations of acid-forming materials are present, to a depth of not less than three (3) feet with earth that will support plant life or with a permanent water impoundment.

(f) The operator shall grade down the banks of any pits or depressions created by the removal of sand or gravel by surface mining to a degree of slope determined by the Department, which shall give due consideration to the natural topography of the land affected and adjacent lands, the composition of such banks and the most beneficial use of the pits and depressions comprising the affected land after reclamation.

(g) All affected land except that which is to be covered with water or used for homesites or industrial purposes shall be revegetated by the planting of seeds, plants, trees, shrubs or other plantings appropriate to the use to be made of the land as determined by the operator. No planting of any kind shall be required on any affected land so long as the chemical and physical characteristics of the soil of such affected land are toxic, deficient in plant nutrients or composed of sand, gravel, shale or stone to such an extent as to seriously inhibit plant growth. The Department may prescribe by rules and regulations the required density of such plantings, and may make replanting requirements.

(h) Except where prevented by weather conditions, all grading shall be completed within one year after mining of the affected land has been completed. Initial seeding of planting shall be made at the first appropriate time following completion of grading. If the operator is unable to acquire sufficient planting stock of desired species from

state nurseries, or acquire such species elsewhere at comparable prices the Department shall grant the operator an extension of time until planting stock is available to plant such land as originally planned.

§ 726. *Refuse disposal areas*

All refuse disposal areas shall be reclaimed or treated or the refuse be contained by the operator to avoid adverse environmental effects.

§ 727. *Inspection*

The Department, or its accredited representatives, may enter upon the lands of the operator at all reasonable times, for the purpose of inspection, to determine whether the provisions of this act have been complied with.

§ 728. *Bond — Cash deposit*

(a) Any bond herein provided to be filed with the Department by the operator shall be in such form as the Director prescribes, payable to the State of Oklahoma, conditioned that the operator shall faithfully perform all requirements of this act and comply with all rules of the Department made in accordance with the provisions of this act. Such bond shall be signed by the operator as principal, and by a good and sufficient corporate surety, licensed to do business in the state, as surety.

(b) The penal sum of such bond shall be determined by the Department as not less than Three Hundred Fifty Dollars ($350.00) nor more than Six Hundred Fifty Dollars ($650.00) for each acre, or fraction thereof, of the affected land. For coal and copper mining, the minimum bond shall be Five Thousand Dollars ($5,000.00). For all other mining, the bond shall be the amount per acre as determined by the department times the number of acres, or fraction of acres involved; however, in no event shall the bond be less than One Thousand Dollars ($1,000.00). Provided no bond

will be required for any sand or gravel producer who sells less than One Thousand Dollars ($1,000.00) per year, when a statement of proof for exemption in the form of a certified affidavit shall be provided by the sand or gravel producer each year before July 1 for the previous twelve (12) months from July 1 through June 30.

In determining the amount of the bond within the above limits, the Department shall take into consideration the character and nature of the overburden, the future suitable use of the land involved and the cost of reclamation to be required. In a particular instance where the circumstances are such to warrant an exception, the Department may reduce the amount of the bond for a particular operation to less than the required minimum, or increase the bond for a particular operation to more than the prescribed maximum.

(c) A bond shall not be cancelled by the surety except after not less than ninety (90) days' prior written notice to the Department. Bonds may be continued in effect from year to year, and a new bond need not be provided for each permit year. A single bond may cover all of the operator's mining operations in the state. The penalty of the bond or amount of cash and securities, as provided in subsection (3) of this section, shall be increased or reduced from time to time as provided in this act.

(d) If the license to do business in the state of any surety upon a bond filed with the Department pursuant to this act shall be suspended or revoked, the operator, within thirty (30) days after receiving notice thereof from the Department, shall substitute for such surety a good and sufficient corporate surety licensed to do business in the state. Upon failure of the operator to make substitution of surety as herein provided, the Department shall have the right to suspend the permit of the operator to conduct operations upon the land described in such permit until such substitution has been made.

(e) In lieu of such bond, the operator may deposit cash and government securities with the Department in an amount equal to that of the required bond on conditions as above prescribed. In the discretion of the Department surety bond requirements may also be fulfilled by using existing reclaimed areas, in excess of cumulative permit or mined acres, that have been completed under the jurisdiction of this act and approved by the Department.

(f) Such bond or security shall remain in effect until the mined acres have been reclaimed, approved and released by the Department. If the Department determines that grading has been satisfactorily completed pursuant to this act, the Department may release up to eighty percent (80%) of the penal sum of the bond filed for each acre of land graded.

§ 729. *Violations — Notice — Hearing — Enforcement*

The Department shall notify the operator and the surety in writing of any claimed violation of the provisions of this act or the rules and regulations of the Department. If the operator denies the alleged violation, the Department shall hold a hearing on said charges. Said hearing shall be held not less than thirty (30) days from the notice of hearing.

At such hearing the operator shall have the right to present evidence in opposition to the claimed violation.

If upon such hearing the Department shall determine that a violation has occurred, the Department shall make detailed findings of the violation and the necessary corrective measures. The order shall provide a reasonable time, commensurate with the work to be done, for the operator to perform the corrective measures. The surety may perform for the operator.

If the operator fails to perform the corrective work required by the Department or fails to properly perform said work, the Department may contract for the work to

be done. The Department shall not issue any permits to an operator who has failed to perform such corrective work, or has defaulted with respect to the bond or other security required by Section 728 of this title, until such obligations are met by the operator or his surety or agent, as determined by the Department.

The Attorney General, upon request of the Department, shall institute proceedings to recover any damages and expense which the Department may have sustained by reason of the default of the operator but in no event shall such recovery exceed the face amount of the bond. Such proceedings shall be brought against the operator and surety either in Oklahoma County or the county in which the violation occurred.

§ 730. *Lateral support*

In the case of strip mining operations which remove and do not replace lateral support, unless pursuant to written agreement between the operator and the adjacent property owner, the top of the consolidated material of the open cut adjacent to the property line of other property not owned or leased by the operator shall, at the time mining is completed, not be closer to such other property line than a distance of twenty-five (25) feet plus one and one-half (1½) times the depth of such cut as measured from original ground surface to the top of consolidated material.

§ 731. *Maps — Release*

The operator shall submit to the Department, no later than September 1 following the end of each permit year, a map in a form approved by the Department showing the location of the pit or pits by section, township, range and county, with such other description as will identify the land which the operator has affected by mining during such permit year and has completed mining operations thereon, with a legend upon such map showing the number of acres of affected land. Such map shall also show in acres the ex-

tent of the reclamation accomplished on the affected land, including grading and revegetation efforts, as of the end of the permit year, and shall show by appropriate designation any deviation from the plan of reclamation filed under subsection (c) of Section 724 of this title and the reasons therefor.

Whenever an operator shall have completed all requirements under the provisions of this act as to any affected land, he shall notify the Department thereof. If the Department determines that the operator has completed reclamation requirements and achieved results appropriate to the use for which the area was reclaimed, the Department shall release the operator from further obligations regarding such affected land and the penalty of the bond shall be reduced proportionately.

§ 732. *Powers and duties of Department*

In addition to the duties and powers conferred on the Department in other provisions of this act, the Department shall have authority and power to:

(a) Adopt and promulgate reasonable rules and regulations respecting the administration of this act and in conformity therewith and the Administrative Procedures Act.

(b) Order, after hearing, the revocation of any permit issued hereunder for violation of this act.

(c) Cause to be instituted, in any court of competent jurisdiction, legal proceedings for injunctive or other appropriate relief to enforce this act.

(d) Make investigations and inspections which are necessary or appropriate to insure compliance with this act.

(e) Collect and disseminate information relating to reclamation of affected lands.

(f) Request the assistance of any federal or state agency for technical advice or any other type of assistance deemed necessary to carry out the purposes of this act.

§ 733. *Legal assistance*

At the request of the Department the Attorney General shall provide such legal assistance as may be needed in interpreting, enforcing and carrying out the provisions of this act including but not limited to institution of and prosecuting legal actions and proceedings for injunctive relief and this improvement shall include the provisions of Section 17 hereof.

§ 734. *Chief Mine Inspector*

Any act authorized to be done by the Department may be performed by the Chief Mine Inspector, or an assistant designated by him.

§ 735. *Sand and gravel — Inspections — Penalties*

The Department is designated as the agency to make safety inspections in sand, sand and gravel and in quarrying operations. Any person required by this act to have a permit who engages in mining without a valid permit therefor issued pursuant to this act is guilty of a misdemeanor, and on conviction thereof shall be fined not less than Fifty ($50.00) nor more than One Thousand Dollars ($1,000.00). Each day of operation without the permit required by this act shall be deemed a separate violation.

§ 736. *Revoked permits*

In no event shall a permit be issued to any operator if a permit issued to such operator has been revoked under Section 12 of this act.

§ 737. *Governmental agencies to conform*

Any municipal or county governmental agency or body engaged in mining as defined in this act shall conform to all requirements of this act respecting reclamation of affected lands.

§ 738. *Judicial review*

All final decisions and orders of the Department shall be subject to judicial review of the acts of administrative agencies.

APPENDIX F

STATE OF OKLAHOMA
THE ATTORNEY GENERAL
LARRY DERRYBERRY
State Capitol, Oklahoma City, Oklahoma 73105, Telephone 405/521-3921

[Seal of the State of Oklahoma]

October 16, 1978

Mr. Ward Padgett
Chief Mine Inspector
Department of Mines
117 State Capitol Building
Oklahoma City, Oklahoma 73105

Re: Rock Island Property
Reclamation

Dear Mr. Padgett:

This letter is being provided pursuant to our previous discussions and your request for information concerning the reclamation problem existing on certain property owned by the Rock Island Improvement Company and located in Latimer and LeFlore Counties, State of Oklahoma.

As you recall, the circumstances giving rise to your request are basically as follows.

In the instant matter, the Rock Island Improvement Company, owner, leased certain properties located in LeFlore and Latimer Counties, State of Oklahoma, to Helmerich and Payne, Inc., a Delaware corporation, the same said lease being for lessee's contemplated mining operation in those areas. Additionally, Helmerich and Payne subleased their interest in said property to one Sam Sexton, Jr., said sublease and agreement being for the purpose of allowing sublessee to conduct mining operations in this area.

It is our understanding that the mining permit in question, the same being as provided for under the provisions

of Title 45, O.S. 1971, §724, was previously issued to the operator, Sexton, sublessee. It is further our understanding that the surety bond as required under the provisions of Title 45, O.S. 1971, §728, was provided, in the amount of $50,000.00, by said operator.

We have been advised that the property in question is presently in need of substantial reclamation work, that directions and orders from your office as to such required reclamation has not heretofore been complied with and further that the surety bond and corresponding proceeds thereof has been provided to your office for reclamation purposes pursuant to the failure of reclamation as required by law and directives from your office.

With these circumstances, you have requested an advisal from this office regarding liability for reclamation work presently required, and the cost of which will exceed the amount and proceeds of bond which have been provided to the State of Oklahoma.

Monetary recovery for and in behalf of the State of Oklahoma in the case of failure to perform required reclamation is provided for under the provisions under the Oklahoma "Mining Lands Reclamation Act", the same being as is found at Title 45, O.S. 1971, §721 et seq. Specifically, Section 729 of this Act provides for the referred recovery. Under this section, once a determination has been made that corrective reclamation measures must be undertaken by an operator, authority is given to the mining department, in the event of default on the part of the operator, to contract to have the required work performed. This statutory provision goes on to state:

> "The Attorney General, upon request of the Department, shall institute proceedings to recover any damages and expenses which the Department may have sustained by reason of the default of the operator but in no event shall such recovery exceed the face amount of the bond. Such proceedings shall be

brought against the operator and surety either in Oklahoma County or the county in which the violation occurred."

As can be determined from a plain reading of the above-quoted section, the Department, by and through this office, may institute an action to recover damages and expenses incurred in the required reclamation, such recovery to be from the operator and/or surety. However, such recovery is limited to the face amount of the bond previously required and provided. Accordingly, it appears that if, in the instant matter, the bond proceeds subject herein have been provided to the State of Oklahoma, then the State of Oklahoma has already recovered, from a monetary standpoint, all that is allowed to be recovered in such proceedings under the violations statute. Stated otherwise, reclamation liability as to the State of Oklahoma appears to be limited for recovery purposes, to the amount of the bond provided pursuant to Section 728, supra. If the State of Oklahoma has already been provided with this amount, then the State of Oklahoma has recovered all that could be recovered under the statute in a civil proceeding.

With respect to other actions which may be taken, it should be recalled that 45 O.S. 1971, §724, pertaining to mining permits, does provide for a criminal sanction for any operator who engages in mining operations not authorized by lawful permit. This section of the statute in essence provides that if an operator engages in separate mining operations not authorized by any existing mining permit, then in that event such operator may be criminally liable for such acts which exceed mining operations authorized by law. Accordingly, this section of the statute may be considered with respect to any further action that may be taken should it be determined that the operator in question exceeded the mining operations authorized by any permit held by such operator.

[APPENDIX]

It should be noted that this opinion, in respects relevant to reclamation liability, has no effect upon that liability which may exist between the parties herein, i.e., the Rock Island Improvement Company (lessor), Helmerich and Payne, Inc (lessee), and Sam Sexton, Jr. (sublessee). From our review of the various lease and sublease agreements submitted with your inquiry, it would certainly appear that the lessee and sublessee herein would be jointly and severally liable to the land owner, lessor, for improvements which may be required to restore the subject land to a condition as nearly as possible as its condition prior to the conduct of mining operations. This would appear to be reflected at paragraphs numbered 3 and 14 of the lease agreement between the lessor and lessee as well as at paragraphs 2, 7 and 12 of the sublease agreement. In this connection it should be additionally noted that this office is without authority or jurisdiction to seek to resolve issues of liability as they pertain to and between the private parties involved in this matter. However, in response to that aspect of your inquiry pertaining to this aspect of the reclamation work, it would be our impression from the review we have had an opportunity to conduct, that the lessor in this matter may indeed recover from the lessee and/or sublessee for restoration work which may be required above and beyond that which may be secured with the heretofore submitted operator's bond proceeds.

Should you require any additional information regarding this matter, please do not hesitate to contact this office at your convenience.

Sincerely yours,

(s) *R. Thomas Lay*
R. THOMAS LAY
ASSISTANT ATTORNEY GENERAL

APPENDIX G

APPRAISAL ASSOCIATES
COMPLETE APPRAISAL SERVICE

office of
OTIS H. EVERSOLE, A.S.R.A., I.F.A.C., C.R.A.

116 South Fourth Street
Muskogee, Oklahoma 74401
Area Code 918 - 682-6640

Re: Tract No. 1 being the interest of Rock Island Improvement Company in the NE 1/4 of Section 25, Township 5 North, Range 25 East, LeFlore County, Oklahoma.

In our opinion, on July 31, 1977, Tract 1, with full and complete reclamation, would have had a fair market value of	$285,567.00
In our opinion, on July 31, 1977, Tract 1 (As Is Condition) had a fair market value of	281,716.00
Increased value of Tract 1 caused by complete reclamation	$ 3,851.00
In our opinion, on July 31, 1977, Tract 1 less coal, with full and complete reclamation, would have a fair market value of	50,567.00
In our opinion, on July 31, 1977, Tract 1 (As Is Condition), less coal, had a fair market value of	46,716.00
Increased value of Tract 1, less coal, caused by complete reclamation	$ 3,851.00

Respectfully submitted, this 3rd day of November, 1980.

APPRAISAL ASSOCIATES
by (s) *Otis H. Eversole*

[APPENDIX]

APPRAISAL ASSOCIATES
COMPLETE APPRAISAL SERVICE

office of
OTIS H. EVERSOLE, A.S.R.A., I.F.A.C., C.R.A.

116 South Fourth Street
Muskogee, Oklahoma 74401
Area Code 918 - 682-6640

Re: Tract 2, being the interest of Rock Island Improvement Company in N½ NE¼ and E½ NW¼ of Section 31, Township 5 North, Range 26 East, LeFlore County, Oklahoma.

In our opinion, on July 31, 1977, Tract 2, with full and complete reclamation, would have had a fair market value of	$215,274.00
In our opinion, on July 31, 1977, Tract 2 (As Was Condition) had a fair market value of	212,328.00
Increased value of Tract 2 caused by complete reclamation	$ 2,946.00
In our opinion, on July 31, 1977, Tract 2 less coal, with full and complete reclamation, would have a fair market value of	25,778.00
In our opinion, on July 31, 1977, Tract 2, (As Was Condition), less coal, had a fair market value of	22,832.00
Increased value of Tract 2, less coal caused by complete reclamation	$ 2,946.00

Respectfully submitted, this 3rd day of November, 1980.

APPRAISAL ASSOCIATES
by (s) *Otis H. Eversole*

No. 82-1613

In the Supreme Court of the United States

OCTOBER TERM, 1982

HELMERICH & PAYNE, INC.
Petitioner

v.

ROCK ISLAND IMPROVEMENT COMPANY
Respondent

v.

SAM SEXTON, JR.
Third Party Defendant

SUPPLEMENTAL APPENDIX AND ERRATA TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES R. EAGLETON
MARC F. CONLEY
HOUSTON AND KLEIN, INC.
3200 University Tower
1722 South Carson
P.O. Box 2967
Tulsa, Oklahoma 74101
(918) 583-2131

Attorneys for Petitioner, Helmerich & Payne, Inc.

April, 1983

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In the
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ERRATA

page 23:

The fourth line of the last full paragraph is corrected to read "88 percent of the $375,000.00, or $330,000.00 to $335,000.00,".

page 6(e):

§ 725(a) is corrected to read "All affected land shall be reclaimed as provided in this act."

The exclusion of land affected by coal mining operations from the reclamation provisions of § 725 was effective February 2, 1978. Oklahoma Session Laws 1978, c. 10, § 1.

Subsequent to the 1978 amendment, reclamation of land affected by surface coal mining has been governed by the Coal Reclamation Acts of 1978-79, codified at 45 O.S. 1981 § 742.1 *et seq.*

Respectfully submitted,

HOUSTON AND KLEIN, INC.

By_____

JAMES R. EAGLETON
MARC F. CONLEY
3200 University Tower
1722 South Carson
P.O. Box 2967
Tulsa, Oklahoma 74101
(918) 583-2131

April, 1983

CERTIFICATE OF SERVICE

I, James R. Eagleton, a member of the Bar of the Supreme Court of the United States and counsel of record for Helmerich & Payne, Inc., Petitioner herein, hereby certify that on the ..... day of ....., 1983, pursuant to Rule 28 of the Rules of the Supreme Court, I served three (3) copies of the foregoing Supplemental Appendix and Errata to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on each of the parties required to be served herein as follows:

On Rock Island Improvement Company, the Respondent herein, by mailing the copies in duly addressed envelopes, with first-class postage prepaid, to John R. Cain, counsel of record for Rock Island Improvement Company, at his office at 880 City National Bank Tower, Oklahoma City, Oklahoma 73102; and on Judge David L. Russell, counsel on brief for Rock Island Improvement Company, at his office at Federal Building, Oklahoma City, Oklahoma 73102.

On Sam Sexton, Jr., Third Party Defendant herein, by mailing the copies in a duly addressed envelope, with first-class postage prepaid, to Sam Sexton, Jr., appearing *pro se*, at his office at P.O. Box 1526, Fort Smith, Arkansas 72902.

All parties required to be served have been served.

James R. Eagleton

APPENDIX H

(Okl., 382 P.2d 109)

Willie PEEVYHOUSE and Lucille Peevyhouse,
Plaintiffs in Error,

v.

GARLAND COAL & MINING COMPANY,
Defendant in Error.

No. 39588.

Supreme Court of Oklahoma.
Dec. 11, 1962.

Modified and Rehearing Denied
March 26, 1963.

Second Rehearing Denied May 28, 1963.

Lessors brought action against lessee for damages for breach of coal mining lease. The District Court of Oklahoma County, W. R. Wallace, Jr., J., entered judgment for the lessees for an allegedly inadequate amount, and the lessees appealed, and the lessor cross-appealed. The Supreme Court, Jackson, J., held that where the lessee failed to perform provision of lease requiring the lessee at the end of the lease to perform remedial work, which would have cost an estimated $29,000, but which would have increased the value of the farm of the lessors only $300, relative economic benefit rule rather than cost of performance rule was applicable, and the lessors could recover only $300.

Judgment modified to reduce recovery from $5,000 to $300 and, as modified, affirmed.

Irwin, J., Williams, C.J., Blackbird, V.C.J., and Berry, J., dissented.

Syllabus by the Court

Where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision which was breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

Appeal from the District Court of Oklahoma County; W. R. Wallace, Jr., Judge.

Action by Willie Peevyhouse and Lucille Peevyhouse, plaintiffs, against Garland Coal & Mining Company, defendant, for damages for breach of contract. From a judgment for plaintiffs, plaintiffs appeal and defendant cross-appeals. Modified and affirmed.

McConnell & Hanson, W. H. McConnell, Oklahoma City, for plaintiffs in error.

Looney, Watts, Looney, Nichols & Johnson, Tom D. Capshaw, Oklahoma City, for defendant in error.

JACKSON, Justice.

In the trial court, plaintiffs Willie and Lucille Peevyhouse sued the defendant, Garland Coal and Mining Company, for damages for breach of contract. Judgment was for plaintiffs in an amount considerably less than was sued for. Plaintiffs appeal and defendant cross-appeals.

In the briefs on appeal, the parties present their argument and contentions under several propositions; however, they all stem from the basic question of whether the trial court properly instructed the jury on the measure of damages.

Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, and in November, 1954, leased the premises to defendant for a period of five years for coal mining purposes. A "strip-mining" operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. In addition to the usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000.00. However, plaintiffs sued for only $25,000.00.

During the trial, it was stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs' objections, defendant thereafter introduced expert testimony as to the "diminution in value" of plaintiffs' farm resulting from the failure of defendant to render performance as agreed in the contract — that is, the difference between the present value of the farm, and what its value would have been if defendant had done what it agreed to do.

At the conclusion of the trial, the court instructed the jury that it must return a verdict for plaintiffs, and left the amount of damages for jury determination. On the measure of damages, the court instructed the jury that it

might consider the cost of performance of the work defendant agreed to do, "together with all of the evidence offered on behalf of either party".

It thus appears that the jury was at liberty to consider the "diminution in value" of plaintiffs' farm as well as the cost of "repair work" in determining the amount of damages.

It returned a verdict for plaintiffs for $5000.00 — only a fraction of the "cost of performance", *but more than the total value of the farm even after the remedial work is done.*

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will cost plaintiffs to obtain performance of the work that was not done because of defendant's default. Defendant argues that the measure of damages is the cost of performance "limited, however, to the total difference in the market value before and after the work was performed".

It appears that this precise question has not heretofore been presented to this court. In Ardizonne v. Archer, 72 Okl. 70, 178 P. 263, this court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well, but here a slightly different factual situation exists. The drilling of an oil well will yield valuable geological information, even if no oil or gas is found, and of course if the well is a producer, the value of the premises increases. In the case before us, it is argued by defendant with some force that the performance of the remedial work defendant agreed to do will add at the most only a few hundred dollars to the value of plaintiffs' farm, and that the damages should be limited to that amount because that is all plaintiffs have lost.

Plaintiffs rely on Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502. In that case, the Minnesota court, in a substantially similar situation, adopted the "cost of performance" rule as-opposed to the "value" rule. The result was to authorize a jury to give plaintiff damages

in the amount of $60,000, where the real estate concerned would have been worth only $12,160, even if the work contracted for had been done.

It may be observed that Groves v. John Wunder Co., supra, is the only case which has come to our attention in which the cost of performance rule has been followed under circumstances where the cost performance greatly exceeded the diminution in value resulting from the breach of contract. Incidentally, it appears that this case was decided by a plurality rather than a majority of the members of the court.

Defendant relies principally upon Sandy Valley & E. R. Co. v. Hughes, 175 Ky. 320, 194 S.W. 344; Bigham v. Wabash-Pittsburg Terminal Ry. Co., 223 Pa. 106, 72 A. 318; and Sweeney v. Lewis Const. Co., 66 Wash. 490, 119 P. 1108. These were all cases in which, under similar circumstances, the appellate courts followed the "value" rule instead of the "cost of performance" rule. Plaintiff points out that in the earliest of these cases (Bigham) the court cites as authority on the measure of damages an earlier Pennsylvania *tort* case, and that the other two cases follow the first, with no explanation as to why a measure of damages ordinarily followed in cases sounding in tort should be used in contract cases. Nevertheless, it is of some significance that three out of four appellate courts have followed the diminution in value rule under circumstances where, as here, the cost of performance greatly exceeds the diminution in value.

The explanation may be found in the fact that the situations presented are artificial ones. It is highly unlikely that the ordinary property owner would agree to pay $29,000 (or its equivalent) for the construction of "improvements" upon his property that would increase its value only about ($300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic.

In Groves v. John Wunder Co., supra, in arriving at its conclusions, the Minnesota court apparently considered the contract involved to be analogous to a building and construction contract, and cited authority for the proposition that the cost of performance or completion of the building as contracted is ordinarily the measure of damages in actions for damages for the breach of such a contract.

In an annotation following the Minnesota case beginning at 123 A.L.R. 515, the annotator places the three cases relied on by defendant (Sandy Valley, Bigham and Sweeney) under the classification of cases involving "grading and excavation contracts".

We do not think either analogy is strictly applicable to the case now before us. The primary purpose of the lease contract between plaintiffs and defendant was neither "building and construction" nor "grading and excavation". It was merely to accomplish the economical recovery and marketing of coal from the premises, to the profit of all parties. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved.

Even in the case of contracts that are unquestionably building and construction contracts, the authorities are not in agreement as to the factors to be considered in determining whether the cost of performance rule or the value rule should be applied. The American Law Institute's Restatement of the Law, Contracts, Volume 1, Sections 346(1)(a)(i) and (ii) submits the proposition that the cost of performance is the proper measure of damages "if this is possible and does not involve *unreasonable economic waste*"; and that the diminution in value caused by the breach is the proper measure "if construction and completion in accordance with the contract would involve *unreasonable economic waste*". (Emphasis supplied.) In an explanatory comment immediately following the text, the Restatement makes it clear that the "economic waste" referred to con-

sists of the destruction of a substantially completed building or other structure. Of course no such destruction is involved in the case now before us.

On the other hand, in McCormick, Damages, Section 168, it is said with regard to building and construction contracts that "* * * in cases where the defect is one that can be repaired or cured without *undue expense*" the cost of performance is the proper measure of damages, but where "* * * the defect in material or construction is one that cannot be remedied without *an expenditure for reconstruction disproportionate to the end to be attained*" (emphasis supplied) the value rule should be followed. The same idea was expressed in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429, as follows:

> "The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in values."

It thus appears that the prime consideration in the Restatement was "economic waste"; and that the prime consideration in McCormick, Damages, and in Jacob & Youngs, Inc. v. Kent, supra, was the relationship between the expense involved and the "end to be attained" — in other words, the "relative economic benefit".

[1] In view of the unrealistic fact situation in the instant case, and certain Oklahoma statutes to be hereinafter noted, we are of the opinion that the "relative economic benefit" is a proper consideration here. This is in accord with the recent case of Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78, where, in applying the cost rule, the Virginia court specifically noted that "* * * the defects are remediable from a practical standpoint and the costs *are not grossly disproportionate to the results to be obtained*" (Emphasis supplied).

[APPENDIX]

23 O.S.1961 §§ 96 and 97 provide as follows:

"§ 96. * * * Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides * * *.

"§ 97. * * * Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered."

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the "cost of performance" rule, plaintiffs might recover an amount about nine times the total value of their farm. Such would seem to be "unconscionable and grossly oppressive damages, contrary to substantial justice" within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the "cost of performance" rule, they will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96.

An analogy may be drawn between the cited sections, and the provisions of 15 O.S.1961 §§ 214 and 215. These sections tend to render void any provisions of a contract which attempt to fix the amount of stipulated damages to be paid in case of a breach, except where it is impracticable or extremely difficult to determine the actual damages. This results in spite of the agreement of the parties, and the obvious and well known rationale is that insofar as they exceed the actual damages suffered, the stipulated damages amount to a penalty or forfeiture which the law does not favor.

23 O.S.1961 §§ 96 and 97 have the same effect in the case now before us. *In spite of the agreement of the parties,* these sections limit the damages recoverable to a reasonable amount not "contrary to substantial justice"; they prevent plaintiffs from recovering a "greater amount in damages for the breach of an obligation" than they would have "gained by the full performance thereof".

[2] We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

We believe the above holding is in conformity with the intention of the Legislature as expressed in the statutes mentioned, and in harmony with the better-reasoned cases from the other jurisdictions where analogous fact situations have been considered. It should be noted that the rule as stated does not interfere with the property owner's right to "do what he will with his own" Chamberlain v. Parker, 45 N.Y. 569) [*sic*], or his right, if he chooses, to contract for "improvements" which will actually have the effect of reducing his property's value. Where such result is in fact contemplated by the parties, and is a main or principal purpose of those contracting, it would seem that the measure of damages for breach would ordinarily be the cost of performance.

The above holding disposes of all of the arguments raised by the parties on appeal.

Under the most liberal view of the evidence herein, the diminution in value resulting to the premises because of non-performance of the remedial work was $300.00. After a careful search of the record, we have found no evidence of a higher figure, and plaintiffs do not argue in their briefs that a greater diminution in value was sustained. It thus appears that the judgment was clearly excessive, and that the amount for which judgment should have been rendered is definitely and satisfactorily shown by the record.

We are asked by each party to modify the judgment in accordance with the respective theories advanced, and it is conceded that we have authority to do so. 12 O.S.1961 § 952; Busboom v. Smith, 199 Okl. 688, 191 P.2d 198; Stumpf v. Stumpf, 173 Okl. 1, 46 P.2d 315.

We are of the opinion that the judgment of the trial court for plaintiffs should be, and it is hereby, modified and reduced to the sum of $300.00, and as so modified it is affirmed.

WELCH, DAVISON, HALLEY, and JOHNSON, JJ., concur.

WILLIAMS, C. J., BLACKBIRD, V. C. J., and IRWIN and BERRY, JJ., dissent.

IRWIN, Justice (dissenting).

By the specific provisions in the coal mining lease under consideration, the defendant agreed as follows:

"* * * "7b Lessee agrees to make fills in the pits dug on said premises on the property line in such manner that fences can be placed thereon and access had to opposite sides of the pits.

"c Lessee agrees to smooth off the top of the spoil banks on the above premises.

"7d Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.

* * * * *

"7f Lessee further agrees to leave no shale or dirt on the high wall of said pits. * * * "

Following the expiration of the lease, plaintiffs made demand upon defendant that it carry out the provisions of the contract and to perform those covenants contained therein.

Defendant admits that it failed to perform its obligations that it agreed and contracted to perform under the lease contract and there is nothing in the record which indicates that defendant could not perform its obligations. Therefore, in my opinion defendant's breach of the contract was wilful and not in good faith.

Although the contract speaks for itself, there were several negotiations between the plaintiffs and defendant before the contract was executed. Defendant admitted in the trial of the action, that plaintiffs insisted that the above provisions be included in the contract and that they would not agree to the coal mining lease unless the above provisions were included.

In consideration for the lease contract, plaintiffs were to receive a certain amount as royalty for the coal produced and marketed and in addition thereto their land was to be restored as provided in the contract.

Defendant received as consideration for the contract, its proportionate share of the coal produced and marketed and in addition thereto, the *right to use* plaintiffs' land in the furtherance of its mining operations.

The cost for performing the contract in question could have been reasonably approximated when the contract was negotiated and executed and there are no conditions now

existing which could not have been reasonably anticipated by the parties. Therefore, defendant had knowledge, when it prevailed upon the plaintiffs to execute the lease, that the cost of performance might be disproportionate to the value or benefits received by plaintiff for the performance.

Defendant has received its benefits under the contract and now urges, in substance, that plaintiffs' measure of damages for its failure to perform should be the economic value of performance to the plaintiffs and not the cost of performance.

If a peculiar set of facts should exist where the above rule should be applied as the proper measure of damages, (and in my judgment those facts do not exist in the instant case) before such rule should be applied, consideration should be given to the benefits received or contracted for by the party who asserts the application of the rule.

Defendant did not have the right to mine plaintiffs' coal or to use plaintiffs' property for its mining operations without the consent of plaintiffs. Defendant had knowledge of the benefits that it would receive under the contract and the approximate cost of performing the contract. With this knowledge, it must be presumed that defendant thought that it would be to its economic advantage to enter into the contract with plaintiffs and that it would reap benefits from the contract, or it would have not entered into the contract.

Therefore, if the value of the performance of a contract should be considered in determining the measure of damages for breach of a contract, the value of the benefits received under the contract by a party who breaches a contract should also be considered. However, in my judgment, to give consideration to either in the instant action, completely rescinds and holds for naught the solemnity of the contract before us and makes an entirely new contract for the parties.

In Goble v. Bell Oil & Gas Co., 97 Okl. 261, 223 P. 371, we held:

> "Even though the contract contains harsh and burdensome terms which the court does not in all respects approve, it is the province of the parties in relation to lawful subject matter to fix their rights and obligations, and the court will give the contract effect according to its expressed provisions, unless it be shown by competent evidence proof that the written agreement as executed is the result of fraud, mistake, or accident."

In Cities Service Oil Co. v. Geolograph Co. Inc., 208 Okl. 179, 254 P.2d 775, we said:

> "While we do not agree that the contract as presently written is an onerous one, we think the short answer is that the folly or wisdom of a contract is not for the court to pass on."

In Great Western Oil & Gas Company v. Mitchell, Okl., 326 P.2d 794, we held:

> "The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the others; the judicial function of a court of law is to enforce a contract as it is written."

I am mindful of Title 23 O.S.1961 § 96, which provides that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases not applicable herein. However, in my judgment, the above statutory provision is not applicable here.

In my judgment, we should follow the case of Groves v. John Wunder Company, 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502, which defendant agrees "that the fact situation is apparently similar to the one in the case at bar", and where the Supreme Court of Minnesota held:

"The owner's or employer's damages for such a breach (i.e. breach hypothesized in 2d syllabus) are to be measured, not in respect to the value of the land to be improved, but by the reasonable cost of doing that which the contractor promised to do and which he left undone."

The hypothesized breach referred to states that where the contractor's breach of a contract is wilful, that is, in bad faith, he is not entitled to any benefit of the equitable doctrine of substantial performance.

In the instant action defendant has made no attempt to even substantially perform. The contract in question is not immoral, is not tained with fraud, and was not entered into through mistake or accident and is not contrary to public policy. It is clear and unambiguous and the parties understood the terms thereof, and the approximate cost of fulfilling the obligations could have been approximately ascertained. There are no conditions existing now which could not have been reasonably anticipated when the contract was negotiated and executed. The defendant could have performed the contract if it desired. It has accepted and reaped the benefits of its contract and now urges that plaintiffs' benefits under the contract be denied. If plaintiffs' benefits are denied, such benefits would inure to the direct benefit of the defendant.

Therefore, in my opinion, the plaintiffs were entitled to specific performance of the contract and since defendant has failed to perform, the proper measure of damages should be the cost of performance. Any other measure of damage would be holding for naught the express provisions of the contract; would be taking from the plaintiffs the benefits of the contract and placing those benefits in defendant which has failed to perform its obligations; would be granting benefits to defendant without a resulting obligation; and would be completely rescinding the solemn obligation of the contract for the benefit of the defendant to the detri-

ment of the plaintiffs by making an entirely new contract for the parties.

I therefore respectfully dissent to the opinion promulgated by a majority of my associates.

SUPPLEMENTAL OPINION ON REHEARING

JACKSON, Justice.

In a Petition for Rehearing, plaintiffs Peevyhouse have raised certain questions not presented in the original briefs on appeal.

They insist that the trial court excluded evidence as to the total value of the premises concerned, and, in effect, that they have not had their "day in court". This argument arises by reason of the fact that their farm consists not merely of the 60 acres covered by the coal mining lease, but includes other lands as well.

Plaintiffs originally pleaded two causes of action against the defendant mining company. The first one was for damages for breach of contract; the second one was for damages to the water well and home of plaintiffs, because of the use of excessively large charges of dynamite or blasting powder in close proximity to the home and well.

Numbered paragraph 2 of plaintiffs' petition alleges that they own and live upon 60 acres of land which are specifically described. *This is the only land described in the petition, and there is no allegation as to the ownership or leasing of any other lands.*

Page 4 of the transcript of evidence reveals that near the beginning of the trial, plaintiff Peevyhouse was asked a question concerning improvements he had made to his property. His answer was "For one thing I built a new home on the place in 1951, and along about that time I was building a pasture. And I would say *ninety percent*

of this 120 acres is in good grass." (Emphasis supplied.) Mr. Watts, defense counsel, then objected "to any testimony about the property, other than the 160 acres". (It is obvious that he means "60" instead of "160".) Further proceedings were as follows:

"The Court: The objection will be sustained as to any other part. Go ahead.

"Mr. McConnell (attorney for plaintiffs): Comes now the plaintiff and dismisses the second cause of action without prejudice."

It thus appears that plaintiffs made no complaint as to the court's exclusion of evidence concerning lands other than the 60 acres described in their petition.

Pages 7 and 8 of the transcript show that later during direct examination of Mr. Peevyhouse, the following occurred:

"Q. (By Mr. McConnell) Now, Mr. Peevyhouse, I ask you to step down here and I ask you if you are familiar with this sketch or drawing?

* * * * *

"A. Yes. I've got about 40 acres here, and here would be 20, and there would be 20 on this sketch. And I've got leased land lying in here, 80 acres.

"Mr. Watts: If your Honor please, I object to anything except the 60 acres involved in this lawsuit.

"The Court: Sustained.

"Q. (By Mr. McConnell) Will you point out to the jury, the boundary line shown of your property?

* * * * *

"A. That blue is where the water is actually standing at the present time. Up until a short time ago this area here came over that far. And this spring all of it would run, come in here out this way and through

here, spreading over this land and all below it. And at the present time this is washed out here.

"Mr. Watts: If your Honor please, I object to that as not the proper measure of damages.

"The Court: The objection will be sustained."

This testimony of Mr. Peevyhouse is difficult for us to follow, even with the exhibits in the case before us. However, no complaint was made by plaintiffs, or any suggestion that the court was in error in excluding this testimony.

The defendant offered the testimony of five witnesses in the trial court; four of them testified as to "diminution in value". They were not cross examined by plaintiffs.

In their motion for new trial, plaintiffs did not complain that they had been prevented from offering evidence as to the diminution in value of their lands; on the contrary, they affirmatively complained of the trial court's action in admitting evidence of the *defendant* on that point.

In the original brief of plaintiffs in error (Peevyhouse) filed in this court there appears the following language at page 4:

"* * * Near the outset of the trial plaintiffs dismissed their second cause of action without prejudice: further, it was stipulated * * *. It was further stipulated that the *only issue remaining in the lawsuit* was the proof and *measure of damages* to which plaintiffs were entitled * * *." (Emphasis supplied.)

In the answer brief of Garland Coal & Mining Co., at page 3, there appears the following language:

"Defendant offered evidence that the total value of the property involved before the mining operation would be $60.00 per acre, and $11.00 per acre after the mining operation (60 acres at $49.00 per acre is $2940.00). Other evidence was that the property was worth $5.00 to $15.00 per acre after the mining, but before the

repairs; and would be worth an increase of $2.00 to $5.00 per acre after the repairs had been made (60 acres at $5.00 per acre is $300.00) (Tr. 96-97, 135, 137-138, 138-141, 143-145, 156, 158)."

At page 18 of the same brief there is another statement to the effect that the "amount of diminution in value of the land" was $300.00.

About two months after the answer brief was filed in this court, plaintiffs filed a reply brief. The reply brief makes no reference at all to the language of the answer brief above quoted and *does not deny that the diminution in value shown by the record amounts to $300.00.* On the contrary, it contains the following language at page 5:

"* * * Plaintiffs in error pointed out in their initial brief that this evidence concerning land values was objectionable as being incompetent and refused to cross-examine or offer rebuttal for the reason that they did not choose to waive their objections to the competency of the evidence by disproving defendant in error's allegations as to land values. We strongly urged at the trial below, and still do, that market value of the land has no application * * *."

Our extended reference to the pleadings, testimony and prior briefs in this case has not been solely for the purpose of showing that plaintiffs failed to complain of the court's rulings. Our purpose, rather, has been to demonstrate the plan and theory upon which plaintiffs tried their case below, and upon which they argued it in the prior briefs on appeal.

The whole record in this case justifies the conclusion that plaintiffs tried their case upon the theory that the "cost of performance" would be the sole measure of damages and that they would recognize no other. In view of the whole record in this case and the original briefs on appeal, we conclude that they so tried it *with notice* that defendant would contend for the "diminution in value" rule. The

testimony to which they specifically refer in the petition for rehearing shows that the trial court properly excluded defendant's evidence concerning lands other than the 60 acres described in the petition because such evidence was *not within the scope of the pleadings*. At no time did plaintiffs ask permission to amend their petition, either with or without prejudice to trial, so as to describe *all* of the lands they own or lease, and no evidence was admitted which could broaden the scope of the petition.

Plaintiffs' petition described 60 acres of land only; plaintiffs offered no evidence on the question of "diminution in value" and objected to similar evidence offered by the defendant; their motion for new trial contained no allegation that they had been prevented from offering evidence on this question; in their reply brief they did not controvert the allegation in defendant's answer brief that the record showed a "diminution in value" of only $300.00; and in view of the stipulation they admittedly made in the trial court, their statement in petition for rehearing that the court's instructions on the measure of damages came as a "complete surprise" and "did not afford them the opportunity to prepare and introduce evidence under the 'diminution in value' rule" is not supported by the record.

[3] We think plaintiffs' present position is that of a plaintiff in any damage suit who has failed to prove his damages — opposed by a defendant who has proved plaintiff's damages; and that plaintiffs' complaint that the record does not show the total "diminution in value" to their lands comes too late. It is well settled that a party will not be permitted to change his theory of the case upon appeal. Knox v. Eason Oil Co., 190 Okl. 627, 126 P.2d 247.

Also, plaintiffs' expressed fear that by introducing evidence on the question of "diminution in value" they would have waived their objection to similar evidence by defendant was not justified. Vogel v. Fisher et al., 203 Okl. 657, 225 P.2d 346; 53 Am.Jur. Trial, Sec. 144.

It is suggested in a brief of amici curiae that our decision in this case has resulted in an impairment of the obligation of the contract of the parties, in violation of Article 1, Section 10, of the Constitution of the United States, and in that connection the only case cited is Sturges v. Crowninshield, 4 Wheat 122, 17 U.S. 1229, 4 L.Ed. 529 (1819). In their brief, amici curiae quote language from the Lawyer's Edition notes of Mr. Stephen K. Williams, in which he summarized the "points and authorities" of one of the counsel appearing before the U. S. Supreme Court.

Sturges v. Crowninshield was an early case in which the Supreme Court considered the power of a state to enact bankruptcy laws, and the extent, if any, to which such power is limited by Article 1, Section 10 of the Constitution. The contracts concerned consisted of promissory notes executed in March, 1811, and the bankruptcy law under which the promisor claimed a discharge was not enacted until April 3, 1811. In a memorable opinion written by Chief Justice Marshall, the court held that insofar as the bankruptcy law purported to discharge the obligations of contracts executed *before its enactment*, it was unconstitutional and void.

The same situation does not exist here. 23 O.S.1961 §§ 96 and 97, cited in our original opinion, were a part of the Revised Laws of 1910 (R.L.1910) Sections 2889 and 2890) [*sic*] and have been in force in this state, in unchanged form, since that codification was adopted by the legislature in 1911. The lease contract concerned in the case now before us was not executed until 1954.

[4, 5] Nor do we agree that our decision itself (as opposed to the statutes cited therein as controlling) impairs the obligations of the contract concerned. It may be conceded that at one time there was respectable authority for the proposition that the "contract" clause was violated by a judicial decision which overruled prior decisions, upon the strength of which contract rights had been acquired.

In this connection, it should be noted that our decision overrules no prior holdings of this court upon which the contracting parties could be said to have relied. Even if it did,

> "* * * it is now definitely and authoritatively settled that such prohibition in federal and state constitutions relate to legislative action and not to judicial decisions. Thus, they do not apply to the decision of a state court, where such decision does not expressly, or by necessary implication, give effect to a subsequent law of the state whereby the obligation of the contract is impaired. * * *" 16 C.J.S. Constitutional Law § 280.

To the same effect, see 12 Am.Jur. Constitutional Law, Sec. 398.

Our decision herein overrules no prior holdings of this court, and it does not give effect to a *subsequent* law of this state. It therefore cannot be said to impair the obligations of the contract of the parties here concerned.

The petition for rehearing is denied.

HALLEY, V.C.J., and WELCH, DAVISON and JOHNSON, JJ., concur.

BLACKBIRD, C.J., and WILLIAMS, IRWIN and BERRY, JJ., dissent.

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No. 82-1613

In the Supreme Court of the United States

OCTOBER TERM, 1982

HELMERICH & PAYNE, INC.
Petitioner

v.

ROCK ISLAND IMPROVEMENT COMPANY
Respondent

v.

SAM SEXTON, JR.
Third Party Defendant

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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CERTIFICATE OF SERVICE follows Brief.

APPENDIX A: Lease Agreement Between Respondent, Rock Island Improvement Company and Petitioner, Helmerich & Payne, Inc.

APPENDIX B: The "Coal Reclamation Act of 1979", 45 O.S.(1981), §742.1, *et seq.*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRELIMINARY MATTERS

Respondent does not take issue with the following portions of Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit: Questions Presented, Parties to the Proceeding Below, Opinions Below, Jurisdictional Basis of Petition for Writ of Certiorari and Basis of Federal Jurisdiction.

STATUTORY PROVISIONS INVOLVED

The pertinent provision of the 1967 Open Cut Land Reclamation Act, 1967 Okla. Sess. Laws, Chapter 186, is quoted verbatim in Respondent's brief at page 2.

The 1971 Oklahoma Mining Land Reclamation Act, 45 O.S.(1971), §721-§738 is set out in Appendix E to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Section 1201(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.S., §1201(c), is quoted verbatim in Respondent's brief at page 3.

The "Coal Reclamation Act of 1979", 45 O.S. §742.1, *et seq.*, is set out in Appendix B hereto.

STATEMENT OF FACTS

Prior to 1967, the State of Oklahoma had no stated policy concerning land reclamation after mining operations. In 1967 the Oklahoma Legislature enacted the Open Cut Land Reclamation Act, 1967 Okla. Sess. Laws, Chapter 186. The policy of the State of Oklahoma was enunciated at 45 O.S.(1967), §702, to be as follows:

> It is hereby declared to be the policy of this state to provide, after mining operations are completed, for the reclamation and conservation of land subjected to surface disturbance by open cut mining and thereby to preserve natural resources, to aid in the protection of wildlife and aquatic resources, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, and to protect and promote the health, safety and general welfare of the people of this state.

A new and more stringent act was passed in 1971. Similar to the 1967 Act, 45 O.S.(1971), §722 provided:

> It is hereby declared to be the policy of this state to provide for the reclamation and conservation of land subject to surface disturbances by mining and thereby to preserve natural resources, to encourage the productive use of such lands after mining, to aid in the protection of wildlife and aquatic resources, to encourage the planting of trees, grasses and other vegetation, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, to aid in the prevention of erosion, landslides, floods and the pollution of waters and air, to protect the natural beauty and aesthetic values in the affected areas of this state, and to protect and promote the health, safety, and general welfare of the people of this state.

In 1968 hearings on proposed legislation regulating surface coal mining began in the United States Senate. (Surface Mining Reclamation: Hearings before the Senate Committee on Interior and Insular Affairs, 90th Cong.2d Sess. (1968).) After six years of thorough legislative consideration including extended hearings about the effect of surface mining on our national's environment and economy, Congress passed the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act or Acts) 91 Stat. 447, 30 U.S.C. §1201, *et seq.* (1976 Ed. Supp. III) [30 U.S.C.S. §1201, *et seq.*]). For a concise report of the legislative history of the Act, see *Hodell* v. *Virginia Surface Min. and Recl. Assoc.*, 452 U.S. 264, 278 n.19 (1981).

The effects of surface coal mining upon this country and its inhabitants are set out in the Act at 30 U.S.C. §1201 (c) which states:

(c) Many surface mining operations result in disturbances of surface area that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitat, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs in efforts to conserve soil, water, and other natural resources.

The Oklahoma Legislature continued to pass more stringent laws with respect to the reclamation of lands affected by surface coal mining operations and passed the "Coal Reclamation Act of 1979" to bring Oklahoma into compliance with Public Law 95-87, the "Surface Mining Control and Reclamation Act of 1977," supra.

From April 8, 1968, through July 31, 1977, Respondent, Rock Island Improvement Company, leased land in Oklahoma to Petitioner, Helmerich & Payne, Inc., for the purpose of coal mining. Two of the sites included in the lease are the subject of this lawsuit. The lease contained a reclamation provision which provided in pertinent part at paragraph three:

"Upon the abandonment or completion of any mining operation, or part thereof, including but not limited to any strip operation, the surface shall be restored as nearly as possible to its condition prior to said mining operation . . . such . . . restoration shall be at the sole expense of the Lessee."

The lease also provided at paragraph fourteen that:

> "As part of the consideration for this lease, Lessee covenants and agrees to comply with all mining laws and regulations of the State of Oklahoma and the United States which regulate or control the mining of coal from the premises here leased . . ." (Lease, Appendix A hereto)

Petitioner did not mine the property itself, but in 1974 subleased the property to Sam Sexton, Jr., Third Party Defendant (R. Vol. III, page 58).

The lease terminated and Sam Sexton, Jr. and Petitioner abandoned the strip pits without reclaiming the land. Thereafter Respondent requested that Petitioner abide by its agreement to restore the land. Petitioner refused, and this lawsuit ensued (R. Vol. V, page 34).

The diversity jurisdiction of the federal court was invoked, and the case was tried in the United States District Court for the Eastern District of Oklahoma to the Honorable Frank H. Seay and to a jury.

The undisputed testimony at the trial was that it would cost $375,000.00 to restore the land to its condition prior to the mining operation (R. Vol. VI, page 111).

The Assistant State Mine Inspector testified that this land would probably never be mined again because of federal environmental restrictions (R. Vol. VI, pages 94-95). He also testified that the land should be reclaimed by backfilling, grading, leveling, redistributing the topsoil, planting vegetation, and filling the pit (R. Vol. VI, page 30).

Six different mining applications filed by Petitioner's Sublessee, Sam Sexton, Jr., indicated that the land was to be reclaimed. The reclamation included the filling of the open pit (R. Vol. III, pages 1-30, 58).

Mr. Bruce Clenton, a representative of Respondent, testified that Respondent wanted to reclaim the land because of (1) the hazard which the property represents in the community, (2) the potential liability of Respondent for accidents which are likely to occur there, (3) the aesthetic considerations in not wanting open scars on the landscape and a blight in the community, and (4) the pressure being exerted upon Respondent by state officials, former governor David Boren, representatives of the community, civic clubs, and others (R. Vol. V, page 32).

The State Mine Inspector testified to the ultra-hazardous condition of the property exemplified by two open pits and by sheer dropoffs (R. Vol. VI, page 32).

The jury awarded Respondent $375,000.00, the cost of reclaiming the land. (Jury Verdict of U. S. District Court for the Eastern District of Oklahoma, filed November 12, 1980, Appendix C to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.)

After Petitioner's Motion for Judgment Notwithstanding the Verdict, Motion to Amend Judgment, and Motion for New Trial were denied, Petitioner appealed to the United States Court of Appeals for the Tenth Circuit and the jury verdict of $375,000.00 was affirmed by that court subject to the modification of $50,000.00 credited to Petitioner as stipulated by the parties. (*Rock Island Improve-*

ment Company v. *Helmerich & Payne, Inc.* v. *Sam Sexton, Jr.*, ... F.2d ....., No. 81-1080 (10th Cir. 1983), Appendix A to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.)

Petitioner filed a Petition for Rehearing, Suggestion for Rehearing En Banc, and Motion to Certify Question to the Oklahoma Supreme Court, which was denied on February 23, 1983 (Appendix B to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit).

Petitioner has filed its Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit asking this Court to decide whether Respondent can recover $375,000.00 for reclamation of the land as the District Court jury and the Tenth Circuit Court of Appeals found when the total market value of the land is only $76,345.00, and whether the measure of damages question should be certified to the Oklahoma Supreme Court (Questions Presented, p. i, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit).

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI.

To warrant the exercise of this Court's discretion to grant certiorari, questions must be of such gravity and importance to the nation as a whole as to require the review of the conclusions of the Circuit Court of Appeals in reference to them. *In re Woods*, 143 U.S. 202 (1892).

In the case of *In re Woods*, supra, this Court declined to consider a mere question of state law. There the inquiry was whether it was settled state law in the State of Minnesota that a judgment of dismissal in a former suit was not a bar to a second suit upon the same cause of action. This Court declined to grant certiorari on this question. In our case Petitioner states that "the principal issue in this controversy is the measure of damages suffered by a lessor of coal deposits upon the failure of the lessee to perform fully a reclamation provision of the lease subsequent to surface mining." This issue is clearly a question of Oklahoma law turning entirely on the facts of this case.

Petitioner seeks reversal of the Opinion of the Tenth Circuit Court of Appeals holding that under the contract between the parties, construed in the light of federal and state policy and statutes governing reclamation of land which has been strip mined, the cost of reclamation is a proper measure of damages under Oklahoma law.

In contending that damages should be limited to diminution in the value of the land, Petitioner relies upon a

case decided by the Oklahoma Supreme Court in 1963 before the state and federal legislation with respect to surface mining control and surface reclamation was passed, *Peevyhouse* v. *Garland Coal and Mining Co.*, 382 P.2d 109 (Okla.), *cert. den.*, 375 U.S. 906 (1963). In *Peevyhouse* the Oklahoma Supreme Court examined a coal mining lease requiring the lessee to reclaim any land it strip mined. At issue was whether the proper damages for the lessee's failure to reclaim was the cost of performance or the diminution of fair market value of the land. The court held that the proper measure of damages was the reasonable cost of reclamation, unless the reclamation requirement was incidental to the lease's main purpose and the cost of reclamation would be grossly disproportionate to the diminution in the land's fair market value. In that case, the lessor's damages were limited to the diminution in value. *Id.* at 114.

Relying upon Petitioner's contention that *Peevyhouse* is still the law in Oklahoma despite the passage of the state and federal statutes, the trial court in this case submitted the issue of the reclamation clause's importance to the jury. The jury found in favor of Respondent and Petitioner appealed on the ground that the trial court should have held that the lease unambiguously focused upon coal mining as its main purpose and that reclamation was merely an incidental purpose. Petitioner further contended that the court should have held that the cost of reclamation was disproportionate to the diminution in land value. The Tenth Circuit Court of Appeals was convinced that the Oklahoma Supreme Court would no longer apply the rule that it established in *Peevyhouse* in 1963 if it had the facts of this case before it. The court held that where there is a statutory

duty to reclaim land which has been strip mined and where the parties to the contract expressly include a reclamation clause which requires the lessee to bear the cost of reclamation, the cost of performance of the reclamation is the proper measure of damages for breach of the reclamation provision of a coal mining lease in Oklahoma. The Tenth Circuit upheld the jury's verdict of $375,000.00 subject to the modification of $50,000.00 credited to Petitioner as stipulated by the parties.

The question of the proper measure of damages in this case under Oklahoma law not only lacks overall national importance, but the question is not likely to be repeated due to the passage of more comprehensive state and federal legislation regulating the reclamation of land subjected to surface mining. The present law provides that if reclamation is not feasible, surface mining operations should not be conducted. 45 O.S.(1981), §742.1 states in pertinent part as follows:

> It is the purpose of this act to protect the rights of surface owners and the environment, and to require reclamation of lands affected by surface and underground coal mining in a manner compatible with the social, environmental and aesthetic needs of this state. *If reclamation is not feasible, surface mining operations should not be conducted* . . . (Emphasis added)

Under this law no one could claim that reclamation was "incidental to the main purpose of the contract" or that "the cost of reclamation was disproportionate to the diminution in land value." Either the land would be reclaimed, or the mining operations would not be conducted. For this reason, the factual situation present under this contract will

not recur and the decision appealed from is without impact outside the limits of this case.

Petitioner asks this Court to certify a question of law to the Oklahoma Supreme Court pursuant to the Uniform Certification of Questions of Law Act, 20 O.S.(1981), §1602. Petitioner did not ask the trial court to certify the question and Petitioner did not ask the Tenth Circuit Court of Appeals to certify the question until after its decision was rendered.

This is not a case where the Appellate Court felt that Oklahoma law was unclear. This is a case where the Appellate court was convinced that the law had changed. The court stated, "We are convinced that the Oklahoma Supreme Court would no longer apply the rule it established in *Peevyhouse* in 1963 if it had the instant dispute before it" (Appendix to Petition for Certiorari to the United States Court of Appeals for the Tenth Circuit, page 6(a)). The decision of the Tenth Circuit Court of Appeals to deny Petitioner's belated Motion to Certify on February 23, 1983, was correct. This Court should decline to grant certiorari to certify a question to the Oklahoma Supreme Court where the issue of Certification was not timely raised in the courts below and where the question lacks national significance.

II.

FACTUAL QUESTIONS HAVE BEEN RESOLVED TWICE IN FAVOR OF RESPONDENT AND THE SUPREME COURT DOES NOT GRANT CERTIORARI TO REVIEW EVIDENCE AND DISCUSS SPECIFIC FACTS.

In this case the jury has made a factual determination that the reclamation clause was not incidental to the main purpose of the contract and/or the cost of reclamation was not disproportionate to the diminution in land value. The Tenth Circuit Court of Appeals determined from the record that the reclamation clause was expressly bargained for and was intended by the parties to insure proper reclamation of the land. Petitioner asks this Court to review the facts and do what it has been unable to pursuade two previous courts to do — relieve it of its obligation to restore the land to its original condition. This Court has wisely ruled that, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

The Supreme Court is a court of law rather than a court for correction of errors and fact finding, and cannot undertake to review concurrent findings of fact by two courts below, in absence of a very obvious and exceptional showing of error, *Grover Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, adhered to in part and reversed in part 339 U.S. 605, motion denied 70 S.Ct. 1017, 94 L.Ed. 1392.

No such showing is made here. Petitioners are not entitled to a third bite of the same apple, and resolution by the Supreme Court of the question presented is unnecessary.

III.

THIS CASE DOES NOT IN ANY SENSE BROADLY CONCERN THE RELATIONSHIP BETWEEN THE FEDERAL COURT SITTING IN DIVERSITY AND THE STATE COURTS.

Petitioner contends that the trial court correctly instructed the jury that *Peevyhouse*, supra, accurately stated the law of Oklahoma (Page 8 of Petitioner's Petition for Certiorari). The jury was instructed under Petitioner's view of Oklahoma law.

The Tenth Circuit Court of Appeals held that although the trial court should not have submitted the issue of the reclamation clause's importance to the jury, to do so was harmless error since the cost of performance is the proper measure of damages under current Oklahoma law and the jury used this measure in calculating damages. This Court must necessarily depend on District Courts and Courts of Appeal for initial determinations of questions of state law and its practice of deference to such determinations should generally render unnecessary review in such respect. *Court* v. *Ash*, 422 U.S. 66 (1975).

The opinion of the Court of Appeals does not cast aside all authority in determining, for the State of Oklahoma, what its law with respect to damages shall be, and the Court of Appeals has not usurped the right and duty of the Oklahoma courts by rejecting *Peevyhouse*, supra, as Petitioner contends. Instead, the Honorable James K. Logan correctly recognizes that although he and his fellow judges, the Honorable Monroe G. McKay and the Honorable James E. Barrett, are bound by decisions of the State Supreme Court in diversity cases, they need not adhere to a decision

if they think it no longer would be followed (Opinion of the United States Court of Appeals Tenth Circuit, Appendix to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, page 6(a)).

This Court has recognized an exception to slavish adherence to state court decisions where it can be said with some assurance that the state supreme court will not follow the decision in the future and where the federal court is convinced by other persuasive data that the highest court of the state would decide otherwise. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 233 (1940); *Meredith* v. *Winterhaven*, 320 U.S. 228 (1943).

Some of the indicia recognized by this Court as affecting judicial rule are: confusion in state court decisions, a developing line of authorities that cast a shadow over the established ones, dicta, doubt or ambiguities in the opinion of state judges on the question and ". . . Legislative development that promises to undermine the judicial rule." *Bernhart* v. *Polygraphic Co. of America*, 350 U.S. 198, 205 (1955).

This Court has always affirmed the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974).

In this case the Tenth Circuit Court of Appeals has considered legislation passed after the *Peevyhouse* decision which expresses a statutory duty to reclaim strip-mined

land and which makes no exception for cases in which the expenditures for reclamation are disproportionate to the resulting increase in the value of the land. By recognizing that the public policy of this State has changed as expressed in its statutes, the Appellate Court exercised its duty to ascertain from all the available data what the current state law is and to construe the contract between Petitioner and Respondent in the light of that legislation.

The holding of the Tenth Circuit Court of Appeals is in accord with other cases which have held that in light of the legislature's declaration that strip mining is generally hazardous to the public welfare and that it is unlawful to strip mine without a state permit, any contract or covenant pertaining to the performance of strip mining must be strictly construed.

Reed v. *Junutolo*, 42 S.E.2d 16 (W.Va. 1946), was a wrongful death action where the court found that the strip mining statute merited consideration in determining whether the excavation involved was a dangerous instrumentality. *West Virginia-Pittsburg Coal Co.* v. *Strong*, 42 S.E.2d 46 (W.Va. 1947), was a suit for declaratory judgment by the owner of mineral and coal rights in a certain parcel of land against the owners of the remaining freehold; they sought a declaration that their mineral rights included the right to strip mine. The court held that in the light of the legislature's declaration that strip mining is generally hazardous to the public welfare and that it is unlawful to strip mine without a state permit, any contract or covenant pertaining to performance of strip mining must be strictly construed.

The Tenth Circuit Court of Appeals did not abandon the elementary principles of damages as Petitioner contends. With respect to Title 23, Okla. Stat. Ann., §96, §97, which Petitioner contends limit the amount of its damages, the Tenth Circuit Court of Appeals found that because the anticipated cost of reclamation may have affected the contract price, these statutes do not preclude the cost of performance as the measure of damages (Opinion, United States Court of Appeals, Tenth Circuit, Appendix A to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, page 7(a)).

CONCLUSION

The decision in this case is fully in accord with other cases. The result is fair. The Petitioner promised to restore the surface as nearly as possible to the condition it was in prior to the mining operation, but failed to do so. The property now represents a hazard and an eyesore to the community, and Respondent is potentially liable for the ultra-hazardous condition which now exists as a result of the operation of Petitioner's agent. It is fair and just that the party who contracted to bear the cost of restoration be required to pay the reclamation costs. The award of the cost of reclamation is not a windfall recovery because it is essential that the land be restored to a safe condition. The Tenth Circuit Court of Appeals, in affirming the jury's award of $375,000.00 (subject to the $50,000.00 credit), did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision. Respondent respectfully

requests that Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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Attorneys for Respondent,
Rock Island Improvement Company

CERTIFICATE OF SERVICE

I, JOHN R. CAIN, have made application for admission to practice as a member of the Bar of the Supreme Court of the United States. I am Counsel of Record for Rock Island Improvement Company, Respondent herein, and I hereby certify that on the ..... day of ....., 1983, pursuant to Rule 28 of the Rules of the Supreme Court, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on each of the parties required to be served herein as follows: On Helmerich & Payne, Inc., the Petitioner, by mailing the copies in a duly addressed envelope with first-class postage prepaid, to JAMES R. EAGLETON, Counsel of Record for Helmerich & Payne, Inc., at his office at 3200 University Tower, 1722 South Carson, P.O. Box 2967, Tulsa, Oklahoma 74101; and, on SAM SEXTON, JR., Third Party Defendant herein, by mailing the copies in a duly addressed envelope, with first-class postage prepaid to Sam Sexton, Jr., appearing *pro se* at his office at P.O. Box 1526, Fort Smith, Arkansas 72902.

All parties required to be served have been served.

JOHN R. CAIN
Counsel for Respondent

APPENDIX A

[Lease Between Respondent, Rock Island Improvement Company and Petitioner, Helmerich & Payne, Inc.]

LEASE OF COAL DEPOSITS

THIS AGREEMENT, made and entered into this 8th day of April, 1968, by and between the ROCK ISLAND IMPROVEMENT COMPANY, a New Jersey corporation, hereinafter designated as "Lessor", and HELMERICH & PAYNE, INC., a Delaware corporation, hereinafter designated as "Lessee".

WITNESSETH

That for and in consideration of Five Thousand Two Hundred Four Dollars and ninety-three cents ($5,204.93) paid to Lessor by Lessee, the receipt of which is hereby acknowledged, and in consideration of the covenants and agreements herein set out to be kept and performed by both of the parties, the parties hereto have agreed, and do hereby covenant each with the other as follows, to-wit:

(1) Lessor does hereby grant, demise, lease and let unto Lessee all coal and coal deposits lying in and under the lands described in Schedule "A" attached hereto and made a part of this lease, and located in the respective counties therein set out, within the State of Oklahoma.

(2) Said premises are hereby leased, let and demised unto Lessee for the purpose of removing, extracting, mining and recovering coal and coal deposits in, upon, or underlying the lands described in Schedule "A". That said mining for coal may be by standard methods commonly known as strip and/or surface mining, and by slope and shaft, known as subterranean and/or underground operations.

(3) Lessor hereby conveys to Lessee only the right to use any of the surface overlying said leased coal and coal deposits owned by it, and such right shall be subject to any present outstanding surface lease. Any use of the surface

by the Lessee for said mining operation must be reasonable for that purpose, and may include the erecting of works, buildings, plants, structures and appliances necessary and reasonable for said mining purposes. Upon the abandonment or completion of any mining operation, or part thereof, including but not limited to any strip operation, the surface shall be restored as nearly as possible to its condition prior to said mining operation, including the removal of any and all such works, building, plants, structures and appliances placed thereon for said mining operation. Such removal and restoration shall be at the sole expense of the Lessee. Lessee, in addition thereto, shall pay any and all damages to any and all surface interests, whether leasehold owners or surface owners, resulting in the loss and damage to any and all property, including but not limited to growing crops and livestock of the surface owner or lessee.

(4) Lessor reserves the right to dispose of any or all of the surface of the leased lands of Schedule "A" provided, however, that the sale of the surface does not interfere with the reasonable use of the surface by the Lessee for said mining operation.

(5) In all strip mining operations on said leased lands Lessee shall maintain gaps or plugs, as they are commonly called, of 600 feet where it would be desirable to, in the future, sink a shaft in order to reach or recover the deep coal that cannot be mined by the strip mining methods.

(6) This lease agreement is subject to all flowage easements and subordination agreements granted to the United States of America in connection with the operation and maintenance of the Eufaula Reservoir of the Canadian River and is further subject to all zoning ordinances and restrictions, existing easements for public roads, streets, highways, public utilities, railroads and pipelines, whether appearing of record or not, but which, in fact, now exist on, over, under or across said land.

(7) Lessee takes this lease and any rights thereunder subject to any oil and gas leasehold estates heretofore granted by this Lessor, and agrees, at Lessee's sole cost and expense, to assume any and all liability for damage to said oil and gas leasehold estate, and for the loss and damage to any and all property, or to the rights of any owner of the oil and gas leasehold estate which might have heretofore been granted by this Lessor.

(8) This lease shall become effective upon its execution and delivery by Lessor, and continue in effect for a term of nine (9) years, provided the annual minimum advance payments hereinafter specified are paid by the Lessee.

(9) Lessee shall pay to Lessor as royalty (hereinafter called tonnage royalty) on each net ton of 2,000 pounds of coal mined and taken from the demised deposit the sum of 25¢ if removed by strip mining operation, and 15¢ if removed by an operation other than strip mining. Said tonnage to be determined by scale weights, with the scale so used to be approved by the Lessor. Lessee to furnish Lessor a sworn report each month showing the true number of tons of coal so mined from the leased property and the method used. The Lessee shall keep true and correct records pertaining to all coal removed from the demised deposit, and the Lessor shall have the right at all reasonable times to inspect said records, including the scale weights. Tonnage royalty on coal mined, removed and sold during any calendar month shall be paid to Lessor on or before the last day of the next succeeding calendar month.

(10) The sum of money first set out as consideration for this lease shall be considered as a minimum advance payment of royalty for the first year this lease is in effect, and Lessee shall have the right to credit and apply the amount so paid against royalties payable for coal mined during the first year of the term of this lease.

(11) Lessee shall pay to the Lessor as a minimum annual advance payment of royalty the sum of $1.00 per acre

of real property covered by said coal lease, in advance, beginning on the next anniversary date of this lease, and payable on each anniversary date thereafter during the term of this lease. Said minimum annual payment shall be credited and treated as minimum advance royalty, and Lessee shall have the right to credit or apply amounts so paid against royalties payable for coal mined during the ensuing year, for which the minimum annual advance payment of tonnage royalty has been paid.

(12) Lessor shall pay and discharge before delinquency, all property taxes, special assessments and levies of whatever nature or kind which may be taxed, charged or assesed against the said land and subsequent to payment of said taxes, special assessment and levies, Lessee shall reimburse the Lessor upon receiving a bill therefor. Lessee shall pay before delinquency all taxes, assessments, license fees or other charges that may be levied or assessed upon all buildings, machinery, structures, fixtures and other improvements placed on the leased premises by Lessee.

(13) Lessee shall have the right to surrender this lease as to the lands described in Schedule "A", or any part thereof, without the payment of any additional consideration for such privilege, by giving notice in writing to the Lessor of such surrender 30 days prior to the effective date, and after the effective date of the notice of surrender Lessee shall thereupon be released from any future advance payment of royalty as to the acreage, or that part of said land so surrendered and released, as herein provided. After the effective date of the surrender, Lessee shall have no right to remove or mine any additional coal from the released lands or acreage, and shall not be entitled to receive back any part of any advance royalty paid for the acreage so released prior to the effective date of surrender.

(14) As a part of the consideration for this lease, Lessee covenants and agrees to comply with all mining laws and regulations of the State of Oklahoma and the United

States which regulate or control the mining of coal from the premises here leased, and Lessee further agrees to comply with the provisions of the Workmen's Compensation Act of the State of Oklahoma, and hereby agrees to protect, save harmless and indemnify Lessor from any claim for damages, personal injury or death which may occur to any person, or persons, in conjunction with, or connected to, the operation of any mine of any kind opened or operated upon the premises here involved under this lease.

(15) Lessee agrees, as a part of the consideration to the Lessor for entering into this agreement, to make, execute and deliver to Lessor a bond in the penal sum of $25,000.00 to bind the Lessee for full and faithful performance of each and all of Lessee's undertakings in this agreement contained and for the indemnity of the Lessor for all loss and damage as herein specified, and for its indemnity against the failure of Lessee to comply with any statute, ordinance, or other governmental regulation applicable to the operation covered by this lease, whether with respect to the accrual of liens thereon or compliance with the Employer's Liability or Workmen's Compensation Act, or relating to mining operations, Miners' Payroll Lien Law, or with respect to any other matter affecting said operations, and said bond shall continue in force and effect, until the statutory limitation shall have run against every cause of action or liability which the Lessee has in this agreement assumed.

(16) In the event Lessor, at any time, considers that Lessee is in default or has failed to make any money payment due hereunder, Lessor shall give to the Lessee written notice of such alleged failure or default, and in the event Lessee shall not, within 30 days thereafter, make payments of any amount due, or shall not have entered upon the correction of any other default, Lessor may, at its option, terminate the unexpired portion of this agreement by notifying Lessee of such election in writing.

(17) Upon the termination of this lease, whether by lapse of time or by forfeiture or surrender, Lessee shall have a reasonable time thereafter, and not more than 60 days, within which to remove through, from and under said leased premises, all machinery, equipment and personal property heretofore installed by it on the leased premises, and to make the removals and restorations heretofore provided for in this lease.

(18) This lease may not be assigned in whole or in part by the Lessee without the written permission of the Lessor.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

ROCK ISLAND IMPROVEMENT COMPANY
By (s) *T. E. Desch*
Vice President

LESSOR

ATTEST:
(s) *P. A. Kasiurak*
Assistant Secretary

HELMERICH & PAYNE, INC.
By (s) *W. A. Black*
Vice-President

LESSEE

ATTEST:
(s) [signature illigible]
Assistant Secretary

[Notary Certification and Schedule "A" omitted]

APPENDIX B

45 O.S.(1981) §742.1, *et seq.*

THE COAL RECLAMATION ACT OF 1979

§ 742.1 *Short title — Intent of Legislature — Application of Act — Public policy — Purpose of act*

This act shall be known and may be cited as the "Coal Reclamation Act of 1979".

It is the intent of the Oklahoma Legislature that the Coal Reclamation Act of 1978, Sections 742 et seq. of Title 45 of the Oklahoma Statutes, and this Coal Reclamation Act of 1979, be read together as the law regulating the reclamation of lands affected by surface coal mining operations and the surface effects of underground coal mining, to bring Oklahoma into compliance with Public Law 95-87, the "Surface Mining Control and Reclamation Act of 1977".[1]

The provisions of the Mining Lands Reclamation Act, Sections 721 through 728 of Title 45 of the Oklahoma Statutes, shall not apply to surface coal mining operations or the surface effects of underground coal mining operations.

The Oklahoma Legislature finds and declares that coal mining operations presently contribute significantly to the nation's energy requirements, that Oklahoma's coal production is part of those energy requirements, and that the cooperative effort established by this act is necessary to prevent or mitigate adverse environmental effects of all surface mining operations.

It is the purpose of this act to protect the rights of surface owners and the environment, and to require reclamation of lands affected by surface and underground coal mining in a manner compatible with the social, environmental and aesthetic needs of this state. If reclamation is not feasible, surface mining operations should not be conducted. It is the intent of the Legislature to insure the existence of an expanding and economically healthy coal mining industry and that there be public participation in the development of rules and regulations appropriate to the State of Okla-

homa and that the Department of Mines exercise the full reach of its powers to insure the protection of the public interest through the effective control of surface mining operations.

§ 742.2 *Definitions*

As used in this act:

1. "Acid drainage" means water with a pH of less than 6.0 Standard Units and in which total acidity exceeds total alkalinity, discharged from active, inactive, or abandoned mines and from areas affected by surface coal mining and reclamation operations.

2. "Acid-forming materials" means earth materials that contain sulfide minerals or other materials which, if exposed to air, water, or weathering processes, will result in the formation of acids that may create acid drainage.

3. "Adjacent area" means land located outside the affected area, permit area, or mine plan area, depending on the context in which "'adjacent area" is used, where air, surface or ground water, fish, wildlife, vegetation or other resources protected by this act may be adversely impacted by surface coal mining and reclamation operations.

4. "Affected area" means, with respect to surface mining activities, any land or water upon or in which those activities are conducted or located. With respect to underground mining activities, "affected area" means any water or surface land upon or in which those activities are conducted or located, and land or water which is located above underground mine workings.

5. "Approximate original contour" means that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles and coal refuse piles eliminated. Water impoundments may be permitted where

the regulatory authority determines that they are in compliance with Section 21 of this act[1] and applicable rules and regulations.

6. "Aquifer" means a zone, stratum, or group of strata confined or unconfined, including perched conditions, that can store and transmit water in sufficient quantities for a specific use.

7. "Auger mining" means a method of mining coal at a cliff or highwall by drilling holes laterally into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

8. "Box cut" means the first open cut in strip mining which results in the placing of overburden on unmined land adjacent to the initial pit and outside the area to be mined.

9. "Coal exploration" means the gathering of surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical or other techniques necessary to determine the quality and quantity of overburden and coal of an area and the gathering of environmental data to establish the conditions of the area beginning before surface coal mining and reclamation operations.

10. "Coal processing plant" means a collection of facilities where run-of-the-mine coal is prepared for market by chemical or physical processing, and separated from its impurities. The processing plant may consist of, but not be limited to, the following support facilities: loading facilities; storage and stockpile facilities; shed, shops and other buildings; water treatment and water storage facilities; settling basins and impoundments; coal processing and other waste disposal areas; roads, railroads and other transport facilities; and utilities.

11. "Consolidated material" means material of sufficient hardness or ability to resist weathering and to inhibit erosion or sloughing.

12. "Department" means the office of the Chief Mine Inspector, including all employees, agents, deputies, and representatives of the Department, herein called the De-

partment of Mines and Mining, or such department, bureau or commission as may lawfully succeed to the powers and duties of such department, having primary responsibility for administering all titles of the Surface Mining Law.

13. "Director" means the Chief Mine Inspector of the State of Oklahoma or such officer, bureau or commission as may lawfully succeed to the powers and duties of such Chief Mine Inspector or such employee agent, deputy or representative of the Chief Mine Inspector as shall be designated by the Chief Mine Inspector to perform any actions required by this act.

14. "Disturbed area" means an area where vegetation, topsoil, or overburden is removed by surface coal mining operations or upon which topsoil, spoil, coal processing waste or noncoal waste is placed. Those areas are "disturbed" until reclamation of those areas is complete and the bond or other assurance of performance is released.

15. "Diversion" means a channel, embankment, or other manmade structure constructed for the purpose of diverting the flow of water from one area to another:

a. Permanent diversion means a diversion remaining after surface coal mining and reclamation are completed and which has been approved for retention by the Department and other appropriate state and federal agencies.

b. Temporary diversion means a diversion which is used during coal exploration or surface coal mining and reclamation operations, and not approved by the Department to remain after reclamation as part of the approved postmining land use.

16. "Ephemeral stream" means a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of snow and ice, and which has a channel bottom that is always above the local water table.

17. "Ground water" means subsurface water that fills available openings in rock or soil materials such that they may be considered water-saturated.

18. "Head-of-hollow fill" means a fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow where side slopes of the existing hollow measured at the steepest point are greater than twenty degrees (20°) or the average slope of the profile of the hollow from the toe of the fill to the top of the fill is greater than ten degrees (10°). In fills with less than two hundred fifty thousand (250,000) cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal seam. In all other head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

19. "Highwall" means the face of exposed overburden and coal in an open cut of a surface or for entry to an underground coal mine.

20. "Hydrologic balance" means the relationship between the quality and quantity of inflow to, outflow from and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage.

21. "Hydrologic regime" means the entire state of water movement in a given area. It is a function of the climate, and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form and falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

22. "Imminent danger to the health and safety of the public" means the existence of any condition or practice, or any violation of a permit or other requirements of this act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons out-

side the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practice giving rise to the peril, would not expose oneself to the danger during the time necessary for abatement.

23. "Impoundment" means a closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

24. "In situ processes" means activities conducted on the surface or underground in connection with in-place distillation, retorting, leaching, or other chemical or physical processing of coal, to include, but not be limited to, in situ gasification, in situ leaching, slurry mining, solution mining, bore hole mining and fluid recovery mining.

25. "Intermittent stream" means a stream or reach of a stream that drains a watershed of at least one (1) square mile, or a stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.

26. "Operator" means any person, partnership, firm or corporation engaged in coal mining who removes or intends to remove more than two hundred fifty (250) tons from the earth within twelve (12) consecutive months in any one location.

27. "Other minerals" means clay, stone, sand, gravel, metalliferous and nonmetalliferous ores, and any other solid material or substances of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form.

28. "Overburden" means all of the earth and other minerals, excluding topsoil, which lie above natural deposits of coal and other minerals, and also means such earth and other materials disturbed from their natural state in the process of surface mining.

29. "Peak" means an upward projecting point of overburden created in the surface mining process.

30. "Perennial stream" means a stream or part of a stream that flows continuously during all of the calendar year as a result of groundwater discharge or surface runoff.

31. "Performance bond" means the indemnity instrument in a sum certain, supported by a surety's guarantee, pledge of collateral or other acceptable contractual guarantee, by which the permit applicant assures faithful performance of all the applicable permit requirements of this act and the rules and regulations promulgated thereunder.

32. "Permit" means a permit to conduct surface coal mining and reclamation operations issued by the Department pursuant to state law.

33. "Permit area" means the area, including all natural and human resources, included within the boundaries specified in a permit, whether or not the areas will be impacted by surface coal mining and reclamation operations, which are designated on the approved maps submitted by the applicant with his permit application and covered by the performance and reclamation bonds as required.

34. "Permittees" means a person holding a "permit" to conduct surface coal mining and reclamation operations issued by the Department pursuant to state law.

35. "Pit" means a tract of land from which overburden or minerals have been or are being removed in the process of surface mining.

36. "Prime farmland" means lands which meet the criteria of the Department, which shall prescribe criteria at least as stringent as criteria prescribed by the United States Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes.

37. "Reclamation" means, through the process of backfilling, regrading, topsoil replacement, reutilization, and revegetation activities, the bringing back of land to its approximate original contours and configuration and resulting

in an equal or better land use category, and shall be consistent with the existing surrounding environment.

38. "Reference areas" means land units of varying size and shape identified and maintained under appropriate management for the purpose of measuring ground cover, productivity and species diversity that are produced naturally or by crop production methods approved by the Department. Reference areas must be representative of geology, soils, slope, aspect and vegetation in the permit area.

39. "Refuse" means all waste material directly connected with the production, cleaning or preparation of coal or other minerals which have been mined by either underground or surface mining method.

40. "Regulatory authority" means the Department of Mines and Mining.

41. "Ridge" means a lengthened elevation of overburden created in the surface mining process.

42. "Significant, imminent environmental harm to land, air or water resources" is determined as follows:

a. An environmental harm is any adverse impact on land, air, or water resources, including, but not limited to, plant and animal life,

b. An environmental harm is imminent if a condition, practice or violation exists which:

(1) is causing such harm or,

(2) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under Section 42 of this act.[2]

c. An environmental harm is significant if that harm is appreciable and not immediately reparable.

43. "Slope" means average inclination of a surface, measured from the horizontal; normally expressed as a unit of vertical distance to a given number of units of horizontal distance (e. g., one unit vertical (1v) to five units horizontal (5h) = 11.3 degrees).

44. "Soil horizons" means contrasting layers of soil lying one below the other, parallel or near parallel to the

land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The three (3) major soil horizons are:

a. "A horizon". The uppermost layer in the soil profile often called the surface soil. It is the part of the soil in which organic matter is most abundant and where leaching of soluble or suspended particles is the greatest.

b. "B horizon". The layer immediately beneath the A horizon and often called the subsoil. This middle layer commonly contains more clay, iron or aluminum than the A or C horizons, and

c. "C horizon". The deepest layer of the soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

45. "Spoil" means displaced overburden.

46. "Strip mining" means those mining operations carried out by removing the overburden lying above natural deposits of coal and other minerals, and mining directly from such natural deposits thereby exposed, but excludes auger mining, quarrying, dredging, pumping or the use of hydraulic methods.

47. "Substantially disturb" means, for purposes of coal exploration, to significantly impact upon land, air or water resources by such activities as blasting, mechanical excavation of land, drilling or altering coal or water exploratory holes or wells, construction or creation of roads and other access routes, and the placement of structures, excavated earth or other debris upon the surface of land.

48. "Surface coal mining and reclamation operations" means surface mining operations and all activities necessary and incident to the reclamation of such operations.

49. "Surface coal mining operations" means:

a. Activities conducted on the surface of lands in connection with a surface coal mine or surface operations and surface impacts incident to an underground coal mine. Such activities include excavation for the purpose of obtaining coal, includ-

ing such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal at or near the mine site. Such activities do not include the extraction of other minerals where coal does not exceed sixteen and two-thirds percent (16⅔%) of the tonnage of materials removed for the purposes of commercial use or sale or coal exploration, subject to Section 14 of this act,[3] and

b. The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or improvement or use of existing roads to gain access to the site of such activities and for haulage and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

50. "Surface water" means water, either flowing or standing, on the surface of the earth.

51. "Topsoil" means the "A" soil horizon, which is the uppermost layer of the three (3) major soil horizons.

52. "Underground mining activities" means a combination of:

a. Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of

roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed, and

b. Underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting, and

c. The areas in which activities enumerated above occur or where such activities disturb the natural land surface.

53. "Unwarranted failure to comply" means the failure of a permittee to prevent the occurrence of any violation of his permit or any requirement of this act due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the act due to indifference, lack of diligence, or lack of reasonable care.

54. "Water table" means the upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

§ 743. *Repealed by Laws 1979, c. 249, § 60, emerg. eff. June 1, 1979*

§ 744. *Application of act*

§ 745.1 *Permits for separate mining operations — Applications — Forms — Plan of reclamation — Fees — Exemptions*

A. It shall be unlawful for any operator to engage in any mining operations in this state without first obtaining from the Department a permit to do so for each separate mining operation. The Department shall determine what

constitutes a separate mining operation by rules and regulations promulgated under the Coal Reclamation Act.[1]

B. Any operator desiring to engage in surface mining eight (8) months after the approval of Oklahoma's regulatory program by the United States Secretary of the Interior shall make written application to the Department for a permit within two (2) months after the approval of the state program. Before the approval of the Oklahoma program by the Secretary of the Interior, the requirements of the Coal Reclamation Act of 1978 shall continue to apply to all permits for coal mining covered by the Coal Reclamation Act. Application for such permit shall be made upon a form furnished by the Department, which form shall require all pertinent information including, but not limited to, all information required by federal law and regulations.

C. Any operator desiring to engage in underground mining shall make written application to the Department for a permit within two (2) months after approval of the state program. Application for such permit shall be made upon a form furnished by the Department, which form shall require all pertinent information including, but not limited to, all information required by federal law and regulations for underground coal mining, taking into account the distinct differences between surface coal mining and underground coal mining.

D. Each application for a permit under subsections B and C of this section shall be accompanied by a plan for the reclamation of the affected land that meets the requirements of the Coal Reclamation Act.

E. Each application for a permit or permit renewal under subsections B and C of this section shall be accompanied by a fee of Five Hundred Dollars ($500.00) for each permit year, payable at the rate of Five Hundred Dollars ($500.00) per year on the anniversary date of the year in which the permit or permit renewal was issued. Such fee shall be deposited in the Department of Mines Revolving Fund and used to offset the cost of reviewing, administer-

ing and enforcing such permit issued pursuant to a state or federal program.

F. The provisions of the Coal Reclamation Act shall not apply to the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him, or the extraction of coal as an incidental part of federal, state or local government-financed highway or other construction under regulations established by the Department.

§ 745.2 *Term of permit — Transferability*

All permits issued pursuant to the requirements of this act shall be issued for a term not to exceed five (5) years and are not transferable.

§ 745.3 *Termination of permit — Extension*

A permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three (3) years of the issuance of the permit. The Department may grant reasonable extensions of time upon a showing and a finding by the Department that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee; provided, further that with respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee shall be deemed to have commenced surface mining operations at such time as the construction of the synthetic fuel or generating facility is initiated.

§ 745.4 *Renewal of permit — Application — Burden of proof — Term*

Any valid permit issued pursuant to this act shall carry with it the right of successive renewal with respect to areas within the boundaries of the existing permit. The holders of the permit may apply for renewal and such renewal shall be issued, provided that on application for renewal the burden shall be on the opponents of renewal, subsequent to

fulfillment of the public notice requirements of Sections 15 and 17 of this act[1] unless it is established that and written findings by the Department are made declaring:

1. The terms and conditions of the existing permit are not being satisfactorily met;

2. The present surface coal mining and reclamation operation is not in compliance with the environmental protection standards of this act and the state program;

3. The renewal requested substantially jeopardizes the operator's continuing responsibility on existing permit areas;

4. The operator has not provided evidence that the performance bond in effect for said operation will continue in full force and effect for any renewal requested in such application as well as any additional bond the Department might require; or

5. Any additional revised or updated information required by the Department has not been provided. Prior to the approval of any renewal of permit the Department shall provide notice to the appropriate public authorities.

If an application for renewal of a valid permit includes a proposal to extend the mining operation beyond the boundaries authorized in the existing permit, the portion of the application for renewal of a valid permit which addresses any new land areas shall be subject to the full standards applicable to new applications under this act.

Any permit renewal shall be for a term not to exceed the period of the original permit established by this act. Application for permit renewal shall be made at least one hundred twenty (120) days prior to the expiration of the valid permit.

§ 745.5 *Reclamation plan*

A. Each applicant for a permit shall be required to submit to the Department as part of the permit application a reclamation plan which shall meet the requirements of this act. Each reclamation plan submitted as part of a permit application shall include, in the degree of detail necessary to demonstrate that reclamation required can be accomplished, a statement of:

1. The identification of the lands subject to surface coal mining operations over the estimated life of those operations and the size, sequence and timing of the subareas for which it is anticipated that individual permits for mining will be sought;

2. The condition of the land to be covered by the permit prior to any mining including:

a. the uses existing at the time of the application, and, if the land has a history of previous mining, the uses which preceded any mining.

b. the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, vegetative cover and, if applicable, a soil survey, and

c. the productivity of the land prior to mining, including appropriate classification as prime farmlands, as well as the average yield of food, fiber, forage or wood products from such lands obtained under high levels of management;

3. The use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, and the comments of any owner of the surface, state and local governments or agencies thereof which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation;

4. A detailed description of how the proposed post-mining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

5. The engineering techniques proposed to be used in mining and reclamation and a description of the major equipment; a plan for the control of surface water drainage and of water accumulation; a plan, where appropriate,

for backfilling, soil stabilization, and compacting, grading and appropriate revegetation; a plan for soil reconstruction, replacement and stabilization; an estimate of the cost per acre of the reclamation, including a statement as to how the permittee plans to comply with each of the requirements of Oklahoma mining reclamation law;

6. The consideration which has been given to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future can be minimized;

7. A detailed estimated timetable for the accomplishment of each major step in the reclamation plan;

8. The consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable state and local land use plans and programs;

9. The steps to be taken to comply with applicable air and water quality laws and regulations and any applicable health and safety standards;

10. The consideration which has been given to developing the reclamation plan in a manner consistent with local physical environmental, and climatological conditions;

11. All lands, interests in lands, or options on such interests held by the applicant or pending bids on interests in lands by the applicant, which lands are contiguous to the area to be covered by the permit;

12. The results of test boring which the applicant has made at the area to be covered by the permit, or other equivalent information and data, including the location of subsurface water, and an analysis of the chemical properties including acid-forming properties of the coal and other minerals and overburden. Information which pertains only to the analysis of the chemical and physical properties of the coal shall be kept confidential and not made a matter of public record. Information regarding mineral or elemental contents which are potentially toxic in the environment shall be a part of the public record;

13. A detailed description of the measures to be taken during the mining and reclamation process to assure the protection of:

a. the quality of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process,
b. the rights of present users to such water, and
c. the quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured; and

14. Such other requirements as the Department shall prescribe by regulations.

B. Any information required by this section which is not on public file pursuant to state law shall be held in confidence by the Department. Information which pertains only to the chemical and physical properties of the coal, except those properties which are potentially toxic in the environment, shall be kept confidential and not made a matter of public record.

§ 745.6 *Performance bond*

A. After a surface coal mining and reclamation permit application has been approved but before such a permit is issued, the applicant shall file with the Department, on a form prescribed and furnished by the Department, a bond for performance payable to the state, and conditional upon faithful performance of all the requirements of law and the permit. Such bond shall be signed by the operator as principal, and by a good and sufficient corporate surety licensed to do business in the state. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit. Bonding will occur in one-year increments for the life of the permit and shall cover that segment of the permit area to be affected during the increment. As one-year increments

of surface coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the Department an additional bond or bonds to cover such increments in accordance with this section.

B. The amount of the bond required for each bonded area shall depend upon the reclamation requirements of the approved permit, and shall reflect the probable difficulty of reclamation and giving consideration to such factors as topography, geology of the site, hydrology, and revegetation potential, and shall be determined by the Department. The amount of the bond for coal mining shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the Department in the event of forfeiture, and in no case shall the bond for the entire area under one permit be less than Ten Thousand Dollars ($10,000.00).

Liability under a surface coal mining bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation requirements. The bond shall be executed by the operator and a corporate surety licensed to do business in Oklahoma, except that the operator may elect to deposit cash, negotiable bonds of the United States Government, or of Oklahoma, negotiable certificates of deposit of any bank organized or transacting business in the United States, Certificates of Deposit or irrevocable letters of credit from a bank or lending institution licensed to do business in the State of Oklahoma. The cash deposit or market value of such securities shall be equal to or greater than the amount of the bond required for the bonded area.

C. A bond shall not be cancelable by the surety except after not less than ninety (90) days' prior written notice to the Department and the arrangement of a replacement bond suitable to the Department. Bonds may be continued in effect from year to year, and a new bond need not be provided for each permit year. The penalty of the bond or amount of cash and securities, as provided in sub-

section B of this section, shall be increased or reduced from time to time as affected land acreages are increased or decreased or when the cost of future reclamation changes.

D. If the license to do business in the state of any surety upon a bond filed with the Department pursuant to the Coal Reclamation Act[1] shall be suspended or revoked, the operator, within thirty (30) days after receiving notice thereof from the Department, shall substitute for such surety a good and sufficient corporate surety licensed to do business in the state. Upon failure of the operator to make substitution of surety as provided in this section, the Department shall have the right to suspend the permit of the operator to conduct operations upon the land described in such permit until such substitution has been made.

E. The Department may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the Department the existence of a suitable agent to receive service of process, and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount.

F. Such bond or security shall remain in effect until the mined acres have been reclaimed, approved and released by the Department.

§ 745.7 *Grant, modification or denial of application for permit — Notice to applicant — Burden of proof — Notice to political subdivisions*

Upon the basis of a complete mining application and reclamation plan, including public notification and an opportunity for a public hearing, the Department shall grant, require modification of or deny the application for a permit in a reasonable time and notify the applicant in writing. The applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the law. Within ten (10) days after the granting of a permit, the Department shall notify the local governmental officials in the political subdivision in which the area of land to be affected

is located that a permit has been issued and shall describe the location of the land.

§ 745.8 *Criteria for approval of permit or revision application*

No permit or revision application shall be approved unelss the application affirmatively demonstrates and the Department finds in writing, on the basis of the information set forth in the application or from information otherwise available, which will be documented in the approval and made available to the applicant, that:

1. The permit application is accurate and complete and that all the requirements of this act have been complied with;

2. The applicant has demonstrated that reclamation as required by this act can be accomplished under the reclamation plan contained in the permit application;

3. The assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by the Department and the proposed operation has been designed to prevent material damage to hydrologic balance outside the permit area;

4. The area proposed to be mined is not included within an area designated unsuitable for surface coal mining, or is not within an area under study for such designation unless the operator demonstrates he has made substantial legal and financial commitments to the operation prior to January 1, 1977; and

5. In cases when the private coal or other mineral estate has been severed from the private surface estate, the applicant has submitted to the Department:

   a. the written consent of the surface owner to the extraction of coal by surface mining methods, or
   b. a conveyance that expressly grants or reserves the right to extract the coal by surface mining methods.

If the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-

subsurface legal relationship shall be determined in accordance with state law. Nothing in this act shall be construed to authorize the Department to adjudicate property rights disputes.

§ 745.9 *Schedule of notices of violations of air or water environmental protection laws to be submitted — Effect of prior violations on application*

The applicant shall file with his permit application a schedule listing all notices of violations of this act and any law, rule or regulation of the United States, or of any department or agency in the United States, pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three-year period prior to the date of application. The schedule shall also indicate the final resolution of any such notice of violation. When the schedule or other information available to the Department indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this act or such other laws referred to in this section, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority which has jurisdiction over such violation. No permit shall be issued to an applicant after a finding by the Department, after opportunity for hearing, that the applicant or the operator specified in the application controls or has controlled mining operations with a demonstrated pattern of willful violations of this act or the laws of another state or the United States regulating surface coal mining operations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this act.

§ 745.10 *Revision of permit*

A. 1. During the term of the permit the permittee may submit an application for a revision of the permit, together with a revised reclamation plan, to the Department.

2. An application for a revision of a permit shall not be approved unless the Department finds that reclamation as required by this act can be accomplished under the revised reclamation plan. The revision shall be approved or disapproved within a reasonable period of time. The Department shall establish guidelines for a determination of the scale or extent of a revision request for which all permit application information requirements and procedures, including notice and hearings, shall apply. Any revisions which propose significant alterations in the reclamation plan shall, at a minimum, be subject to notice and hearing requirements.

3. Any extensions to the area covered by the permit except incidental boundary revisions shall be made by application for another permit.

B. No transfer, assignment or sale of the rights under any permit issued pursuant to this act shall be made.

C. The Department shall, within a time limit prescribed in regulations, review outstanding permits and may require reasonable revision or modification of the permit provisions during the term of such permit. Such revision or modification shall be based upon a written finding and subject to notice and hearing requirements established by the Department.

§ 745.11 *Exploration regulations — Contents — Confidential or privileged information — Tonnage limitations — violations*

A. Coal exploration operations which substantially disturb the natural land surface shall be conducted in accordance with exploration regulations issued by the Department. Such regulations shall include, at a minimum:

1. The requirement that prior to conducting any exploration under this section, any person shall file with the Department notice of intention to explore, and such notice shall include a description of the exploration area and the period of supposed exploration; and

2. Provisions for reclamation, in accordance with the surface coal mining operations performance standards of this act, of all lands disturbed in exploration, including excavations, roads, drill holes and the removal of necessary facilities and equipment.

B. Information submitted to the Department pursuant to this subsection which is designated in writing as confidential, concerning trade secrets or privileged commercial or financial information which relates to the competitive rights of the person or entity intended to explore the described area, shall not be available for public examination.

C. No operator shall remove more than two hundred fifty (250) tons of coal pursuant to an exploration permit without the specific written approval of the Department.

D. Any person violating this section shall be subject to the penalty provisions of this act.

§ 745.12 *Advertisement of ownership, location and boundaries of affected land — Notice to political subdivisions, etc. — Comments on proposed operation*

At the time of submission of an application for a surface coal mining and reclamation permit, or revision of an existing permit, the applicant shall submit to the Department a copy of his advertisement of the ownership, precise location and boundaries of the land to be affected. At the time of submission such advertisement shall be placed by the applicant in a local newspaper of general circulation in the locality of the proposed surface mine at least once a week for four (4) consecutive weeks. The Department shall notify various local governmental bodies, planning agencies, sewage and water treatment authorities and water companies in the locality in which the proposed surface mining will take place notifying them of the operator's intention to surface mine a particularly described tract of land and indicating the application's permit number and where a copy of the proposed mining and reclamation plan may be inspected. These local bodies, agencies, authorities or com-

panies may submit written comments within a reasonable period established by the Department on the mining applications with respect to the effect of the proposed operation on the environment which are within their areas of responsibility. Such comments shall immediately be transmitted to the applicant by the Department and shall be made available to the public at the same location as are the mining applications.

§ 745.13 *Objections to application for permit — Informal Conference — Hearings*

A. Any person having an interest which is or may be adversely affected, or the chief administrative officer of any federal, state or local governmental agency or authority, shall have the right to file written objections to the application for a permit with the Department within thirty (30) days after the last publication of the notice. Such objections shall immediately be transmitted to the applicant by the Department and shall be made available to the public. If written objections are filed and an informal conference requested, the Department shall then hold an informal conference in the locality of the proposed mining. The date, time and location of such informal conference shall be advertised by the Department in a newspaper of general circulation in the locality at least two (2) weeks prior to the scheduled conference date. The Department may arrange with the applicant, upon request by any party to the application process, access to the proposed mining area for the purpose of gathering information relevant to the proceeding. An electronic or stenographic record shall be made of the conference proceeding, unless waived by all parties. Such record shall be maintained and shall be accessible to the parties until final release of the applicant's performance bond. In the event all parties requesting the informal conference stipulate agreement prior to the requested informal conference and withdraw their requests, such informal conference need not be held.

B. Where the lands included in an application for a permit are the subject of a federal coal lease in connection with which hearings were held and determinations were made under the Mineral Lands Leasing Act, as amended, 30 U.S.C. 201a, such hearings shall be deemed as to the matters covered to satisfy the requirements of this section and Section 17 of this act[1] and such determinations shall be deemed to be a part of the record and conclusive for purposes of this section and Section 17 of this act.

§ 745.14 *Findings — Notice to applicant — Hearing on findings*

A. If an informal conference has been held, the Department shall issue and furnish the applicant and persons who are parties to the administrative proceedings with the written finding of the Department, granting or denying the permit in whole or in part and stating the reasons therefor, within the sixty (60) days of the hearings in the informal conference.

B. If no informal conference has been held, the Department shall notify the applicant for a permit, within a reasonable time, whether the application has been approved or disapproved in whole or in part.

C. If the application is approved, the permit shall be issued. If the application is disapproved, specific reasons shall be set forth in the notification. Within thirty (30) days after the applicant is notified of the final decision of the Department on the permit application, the applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination. The Department shall hold a hearing within thirty (30) days of such request and provide notification to all interested parties at the time that the applicant is so notified. Such hearing shall be of record, adjudicatory in nature and no person who presided at an informal conference shall either preside at the hearing or participate in this decision or in any administrative appeal. Within thirty (30) days after the hearing the Department shall issue and fur-

nish the applicant, and all persons who participated in the hearing, with the written decision of the Department granting or denying the permit in whole or in part and stating the reasons.

§ 745.15 *Temporary relief pending final determination of proceedings — Conduct of hearings — Appeals*

When a hearing is requested pursuant to this act, the Department may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if:

1. All parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

2. The person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

3. Such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air or water resources.

For the purpose of this and every hearing authorized by this act, the Department may, pursuant to the Administrative Procedures Act,[1] administer oaths, subpoena witnesses, or written or printed materials, compel attendance of the witnesses, or production of the materials, and take evidence including, but not limited to, site inspections of the land to be affected and other surface coal mining operations carried on by the applicant in the general vicinity of the proposed operation. A verbatim record of each public hearing required by this act shall be made, and a transcript made available on the motion of any party or by order of the Department.

Any applicant or any person with an interest which is or may be adversely affected who has participated in the application process as an objector, and who is aggrieved by the decision of the Department, or if the Department fails to act within the time limits specified in this act, shall have the right to appeal as provided by Section 53 of this act.[2]

§ 745.16 *Determination of probable hydrologic consequences — Statement of results of test borings or core samplings*

If the Department finds that the probable total annual production at all locations of any coal surface mining operator will not exceed one hundred thousand (100,000) tons, the determination of probable hydrologic consequences required by law and the statement of the result of test borings or core samplings required by law shall, upon the written request of the operator, be performed by a qualified public or private laboratory designated by the Department and the cost of the preparation of such determination and statement shall be assumed by the Department.

§ 745.17 *Copy of application to be filed with county recorder or appropriate public office — Liability insurance — Blasting plans*

A. Each applicant for a surface coal mining and reclamation permit shall file a copy of his application for public inspection with the recorder at the courthouse of the county or an appropriate public office approved by the Department where the mining is proposed to occur, except for that information pertaining to the coal seam itself.

B. Each applicant for a permit shall be required to submit to the Department as part of the permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface mining and reclamation operations for which such permit is sought, or evidence that the applicant has satisfied other state or federal self-insurance requirements. Such policy shall provide for personal injury and property damage protection in an amount adequate to compensate any persons damaged as a result of surface coal mining and reclamation operations including use of explosives and entitled to compensation under the applicable provisions of state law. Such policy shall be maintained in full force and effect

during the terms of the permit or any renewal, including the length of all reclamation operations.

C. Each applicant for a surface coal mining and reclamation permit shall submit to the Department as part of the permit application a blasting plan which shall outline the procedures and standards by which the operator will meet the provisions of law.

§ 745.18 *Impoundments of water on mining sites*

The operator may create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities only when it is adequately demonstrated that:

1. The size of the impoundment is adequate for its intended purposes;

2. The impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Public Law 83-566 (16 U.S.C. 1006);

3. The quality of impounded water will be suitable on a permanent basis for its intended use and that discharges from the impoundment will not degrade the water quality below water quality standards established pursuant to applicable federal and state law in the receiving stream;

4. The level of water will be reasonably stable;

5. Final grading will provide adequate safety and access for proposed water users; and

6. Such water impoundments will not result in the diminution of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational or domestic uses.

§ 745.19 *Augering operations*

The operator shall conduct any augering operation associated with surface mining in a manner to maximize recoverability of coal and other mineral reserves remaining after the operation and reclamation are complete, and seal all auger holes with an impervious and noncombustible material in order to prevent drainage except where the De-

partment determines that the resulting impoundment of water in such auger holes may create a hazard to the environment or the public health or safety. The Department may prohibit augering if necessary to maximize the utilization recoverability or conservation of the solid fuel resources or to protect against adverse water quality impacts.

§ 745.20 *Disposal of wastes*

The operator shall, with respect to surface disposal of mine wastes, tailings, coal processing wastes, and other wastes in areas other than the mine working or excavations, stabilize all waste piles in designated areas through construction in compacted layers including the use of incombustible and impervious materials if necessary. He shall also assure that the final contour of the waste pile will be compatible with natural surroundings and that the site can and will be stabilized and revegetated according to the provisions of this act.

§ 745.21 *Surface mining near active and abandoned underground mines*

The operator shall refrain from surface coal mining within five hundred (500) feet from active and abandoned underground mines in order to prevent breakthroughs and to protect health or safety of miners. The Department shall permit an operator to mine near, through or partially through an abandoned underground mine or closer to an active underground mine if the nature, timing and sequencing of the approximate coincidence of specific surface mine activities with specific underground mine activities will result in improved resource recovery, improved land use category abatement of water pollution, or elimination of hazards to the health and safety of underground miners and the public.

§ 745.22 *Reclamation efforts — Variances*

The operator shall insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining

operations. Where the applicant proposes to combine surface mining operations with underground mining operations to assure maximum practical recovery of the coal and other mineral ressources, the Department may grant a variance for specific areas within the reclamation plan from the requirement that reclamation efforts proceed as contemporaneously as practicable to permit underground mining operations prior to reclamation:

1. If the Department finds in writing that:
   a. the applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining operations,
   b. the proposed underground mining operations are necessary or desirable to assure maximum practical recovery of the coal and other mineral resources and will avoid multiple disturbance of the surface,
   c. the applicant has satisfactorily demonstrated that the plan for the underground mining operations conforms to requirements for underground mining in the jurisdiction and that permits necessary for the underground mining operations have been issued,
   d. the areas proposed for the variance have been shown by the applicant to be necessary for the implementing of the proposed underground mining operations,
   e. no substantial adverse environmental damage, either on-site or off-site, will result from the delay in completion of reclamation as required by this act, and
   f. provisions for the off-site storage of spoil will comply with the requirements of this act;

2. If the United States Secretary of the Interior has promulgated specific regulations to govern the granting of such variances in accordance with the provisions of federal law, and has imposed such additional requirements as he deems necessary;

3. If variances granted under the provisions of this section are to be reviewed by the Department not more than three (3) years from the date of issuance of the permit; and

4. If liability under the bond filed by the applicant with the Department shall be for the duration of the underground mining operations and until the requirements of this act have been fully complied with.

§ 754. *Reestablishment of native flora — Lenth of liability*

A. The operator shall establish on the regraded areas and all other lands affected a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan.

B. The operator shall assume the responsibility for successful revegetation for a period of five (5) full years after the last year of augmented seeding, fertilizing, irrigation or other work in order to assure compliance with this section. In those areas or regions of Oklahoma, where the annual average precipitation is twenty-six (26) inches or less as determined by the most recent National Oceanic and Atmospheric Administration Annual Summary of Climatological Data for Oklahoma, the operator's assumption of responsibility and liability will extend for a period of ten (10) full years after the last year of augmented seeding, fertilizing, irrigation or other work. When the Department approves a long-term intensive agricultural postmining land use, the applicable five- or ten-year period of responsibility for revegetation shall commence at the date of initial planting for such long-term intensive agricultural postmining land use. When the Department issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan, the

Department may grant exception to the provisions of subsection A of this section.

§ 754.1 *Spoil material — Placement*

The operator shall place all excess spoil material resulting from coal surface mining and reclamation activities in such a manner that:

1. Spoil is transported and placed in a controlled manner in position for concurrent compaction and in such a way to assure mass stability and to prevent mass movement;

2. The areas of disposal are within the bonded permit areas and all organic matter shall be removed immediately prior to spoil placement;

3. Appropriate surface and internal drainage systems and diversion ditches are used so as to prevent spoil erosion and movement;

4. The disposal area does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented;

5. If placed on a slope, the spoil is placed upon the most moderate slope among those upon which, in the judgment of the Department, the spoil could be placed in compliance with all the requirements of this act, and shall be placed, where possible, upon, or above, a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement;

6. Where the toe of the spoil rests on a downslope, a rock toe buttress, of sufficient size to prevent mass movement, is constructed;

7. The final configuration is compatible with the natural drainage pattern and surroundings and suitable for intended uses;

8. Design of the spoil disposal area is certified by a qualified registered professional engineer in conformance with professional standards; and

9. All other provisions of this act are met.

§ 754.2 *Performance standards*

The operator shall also fulfill the following performance standards:

1. Conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future through surface coal mining can be minimized;

2. Stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution;

3. Restore the topsoil or the best available subsoil which is best able to support vegetation;

4. Insure that all debris, acid-forming materials, toxic materials, or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters and that contingency plans are developed to prevent sustained combustion;

5. Insure that the construction, maintenance and postmining conditions of access roads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property;

6. Refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water;

7. Protect off-site areas from slides or damage occurring during the surface coal mining and reclamation operations, and not deposit spoil material or locate any part of the operations or waste accumulations outside the permit area;

8. To the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable;

9. Provide for an undisturbed natural barrier beginning at the elevation of the lowest coal seam to be mined and extending from the outslope for such distance as the Department shall determine shall be retained in place as a barrier to slides and erosion; and

10. Meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this act, taking into consideration the physical, climatological, and other characteristics of the site.

§ 755. *Steep slope surface mining—Performance standards—Exemptions*

§ 756. *Performance standards for removal of entire coal seam—Postmining land use as condition for granting permit*

A. Where a surface coal mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge or hill by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining and which will be capable of supporting postmining uses in accordance with the requirements of this section, such operation shall require that:

1. The toe of the lowest coal seam and the overburden associated with it are retained in place as a barrier to slides and erosion;

2. The reclaimed area is stable;

3. The resulting plateau or rolling contour drains inward from the outslopes except at specified points;

4. No damage will be done to natural watercourses;

5. Spoil will be placed on the mountaintop bench as is necessary to achieve the planned postmining land use; and

6. Stability of the spoil retained on the mountaintop is insured and meets the other requirements of this act.

Such operation shall not be required to restore the original contour as provided in Section 747 of this title.

B. In cases where an industrial, commercial, agricultural, residental or public facility, including recreational facilities, use is proposed as the postmining use of the affected land, the Department may grant a permit for a surface mining operation of the nature described in this section if:

1. The proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use after consultation with the appropriate land use planning agencies;

2. The applicant presents specific plans for the proposed postmining land use and appropriate assurances that such use will be:

a. compatible with adjacent land uses,

b. obtainable according to data regarding expected need and market,

c. assured of investment in necessary public facilities,

d. supported by commitments from public agencies where appropriate,

e. practicable with respect to private financial capability for completion of the proposed use,

f. planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use, and

g. designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site;

3. The proposed use would be consistent with adjacent land uses, and existing state and local land use plans and programs;

4. The Department provides the governing body of the unit of general-purpose government in which the land is located and any state or federal agency which the Department, in its discretion, determines to have an interest in the proposed use, an opportunity of not more than sixty (60) days to review and comment on the proposed use;

5. All other requirements of this act will be met.

§§ 758, 759. *Repealed by Laws 1979, c. 249, § 60, emerg. eff. June 1, 1979*

§ 760.1 *Suspension of underground mining in certain areas*

In order to protect the stability of the land, the Department shall suspend underground coal mining under urbanized areas, cities, towns and communities and adjacent to industrial or commercial buildings, major impoundments or permanent streams if it finds imminent danger to inhabitants of the urbanized areas, cities, towns and communities.

§ 760.2 *Application of act to surface operations—Modifications*

The provisions of this act relating to permits, bonds, inspections and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining. The Department shall adopt such modifications.

§ 762. *Repealed by Laws 1979, c. 249, § 60, emerg. eff. June 1, 1979*

§§ 763, 764. *Renumbered as §§ 791, 792 of this title by Laws 1979, c. 249, § 59, emerg. eff. June 1, 1979*

§ 765. *Data collection and analysis*

A. The Department shall require any permittee to establish and maintain appropriate records, make monthly reports to the Department, install, use and maintain any necessary monitoring equipment or methods, evaluate results in accordance with such methods, at such locations, intervals and in such manner as the Department shall prescribe, and provide such other information relative to surface coal mining and reclamation operations as the Department deems reasonable and necessary.

B. For those surface coal mining and reclamation operations which remove or disturb strata that serve as aquifers which significantly insure the hydologic balance of water use either on or off the mining site, the Department shall specify:

1. Monitoring sites to record the quantity and quality of surface drainage above and below the minesite as well as in the potential zone of influence;

2. Monitoring sites to record level, amount and samples of ground water and aquifers potentially affected by the mining and also directly below the lowermost (deepest) coal seam to be mined;

3. Records of well logs and borehole data to be maintained; and

4. Monitoring sites to record precipitation.

The monitoring data collection and analysis required by this section shall be conducted according to standards and procedures set forth by the Department in order to assure their reliability and validity.

§ 766. *Right of entry—Inspections—Signs—Violations—Public inspection of records, etc.*

A. The representatives of the Department may enter upon the lands of the operator at all times deemed reasonable and necessary by the Department without advance notice and upon presentation of appropriate credentials for the purpose of inspection, to determine whether the provisions of this act have been complied with, and may at reasonable times, and without delay, have access to and copy any records, inspect any monitoring equipment or method of operations required under this act.

B. The inspections by the Department shall:

1. Occur on an irregular basis averaging not less than one partial inspection per month and one complete inspection per calendar quarter for the surface coal mining and reclamation operation covered by each permit;

2. Occur without prior notice to the permittee or his agents or employees except for necessary on-site meetings with the permittee; and

3. Include the filing of inspection reports adequate to enforce the requirements of and to carry out the terms and purposes of this act.

C. Each permittee shall maintain in a conspicuous place at the entrances to the surface coal mining and reclamation operations clearly visible signs which set forth the name, business address and phone number of the permittee and the permit number of the surface coal mining and reclamation operations.

D. Each inspector, upon detection of each violation of any requirement of this act, shall immediately inform the operator in writing of the violation, and shall report in writing any such violation to the Department.

E. Copies of any records, reports, inspection materials or information obtained under this act by the Department shall be made immediately available for inspection by the public at central and sufficient locations designated by the Department in the county, multicounty and state area of mining so that they are conveniently available to residents in the areas of mining, excepting such information required to be kept confidential by this act.

§ 767. *Conflicts of interest—Violations*

No employee of the Department of Mines or any other state employee performing any function or duty under this act shall be directly or indirectly interested in any mining operation, or any contract for purchase of any property or construction or any work for any mining operation. Any person who knowingly violates the provision of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished by incarceration for a period not to exceed one (1) year or a fine not to exceed Five Thousand Dollars ($5,000.00), or both.

§ 768. *Reports of violations of act—Informal review—Inspection procedure*

A. Any person who is or may be adversely affected by a surface mining operation may notify the Chief Mine Inspector or any representative of the Chief Mine Inspector

responsible for conducting the inspection, in writing, of any violation of this act which he has reason to believe exists at the surface mining site. The Chief Mine Inspector shall, by regulation, establish procedures for informal review of any refusal by a representative of the Chief Mine Inspector to issue a citation with respect to any such alleged violation. The Chief Mine Inspector shall furnish such persons requesting the review a written statement of the reasons for the Chief Mine Inspector's final disposition of the case.

B. The Chief Mine Inspector shall also, by regulation, establish procedures to insure that adequate and complete inspections are made. Any such person may notify the Chief Mine Inspector of any failure to make such inspections, after which the Chief Mine Inspector shall determine whether adequate and complete inspections have been made. The Chief Mine Inspector shall furnish such persons a written statement of the reasons for the Chief Mine Inspector's determination that adequate and complete inspections have or have not been conducted.

§ 769. *Civil penalties*

A. In the enforcement of a state program pursuant to this act any operator who violates any permit condition or who violates any other provision of this act may be assessed a civil penalty by the Department except that if such violation leads to the issuance of a cessation order under this act, the civil penalty shall be assessed. Such penalty shall not exceed Five Thousand Dollars ($5,000.00) for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the operator's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

B. A civil penalty shall be assessed by the Department only after the person charged with a violation described under subsection A of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Chief Mine Inspector shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. When appropriate, the Chief Mine Inspector shall consolidate such hearings with other proceedings under this act. Any hearing under this section shall be of record. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Chief Mine Inspector after the Chief Mine Inspector has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

C. Upon the issuance of a notice or order charging that a violation of this act has occurred, the Department shall inform the operator within thirty (30) days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Department for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Department shall within thirty (30) days remit the appropriate amount to the person, with interest at the rate of six percent (6%), or at the prevailing United States Department of the Treasury rate, whichever is greater. Failure to forward the money to the Department within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

D. Civil penalties owed under this act may be recovered in a civil action brought by the Attorney General at

the request of the Chief Mine Inspector in any appropriate district court.

E. Any person who willfully and knowingly violates a condition of a permit issued pursuant to this act or fails or refuses to comply with any order issued under this act, or any order incorporated in a final decision issued by the Chief Mine Inspector under this act except an order incorporated in a decision issued under subsection B of this section, shall, upon conviction, be punished by a fine of not more than Ten Thousand Dollars ($10,000.00) or by imprisonment for not more than one (1) year, or both.

F. Whenever a corporate permittee violates a condition of a permit issued pursuant to this act or fails or refuses to comply with any order issued under this act, or any order incorporated in a final decision issued by the Chief Mine Inspector under this act except an order incorporated in a decision issued under subsection B of this section, any director, officer or agent of such corporation who willfully and knowingly authorized, ordered or carried out such violation, failure or refusal shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections A and E of this section.

G. Whoever knowingly makes any false statement, representation or certification, or knowingly fails to make any statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to this act or any order of decision issued by the Department under this act, shall, upon conviction, be punished by a fine of not more than Ten Thousand Dollars ($10,000.00) or by imprisonment for not more than one (1) year, or both.

H. Any operator who fails to correct a violation for which a citation has been issued within the period permitted for its correction shall be assessed a civil penalty of not less than Seven Hundred Fifty Dollars ($750.00) for each day during which such failure or violation continues.

The period permitted for corrections of violations shall not end until:

1. The entry of a final order by the Department after an expedited hearing, as provided by Section 53 of this act,[1] which ordered the suspension of the abatement requirements of the citation because it was determined that the operator will suffer irreparable loss or damage from the application of the abatement requirements; or

2. The entry of an order by a court in any review proceedings initiated by the operator in which the court orders the suspension of the abatement requirements.

I. Any person who shall, except as permitted by law, willfully resist, prevent, impede or interfere with the Chief Mine Inspector or any of the agents or employees of the Department in the performance of duties pursuant to this act shall, upon conviction, be punished by a fine of not more than Five Thousand Dollars ($5,000.00), or by imprisonment for not more than one (1) year, or both.

§ 770. *Release of performance bond or deposit—Application*

The permittee may file a request with the Department for the release of all or part of a performance bond or deposit. Within thirty (30) days after any application for bond or deposit release has been filed with the Department, the operator shall submit a copy of an advertisement placed at least once a week for four (4) successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. Such advertisement shall be considered part of any bond release application and shall contain a notification of the precise location of the land affected, the number of acres, the permit and the date approved, the amount of the bond filed and the portion sought to be released, and the type and appropriate dates of reclamation work performed and a description of the results achieved as they relate to the operator's approved reclamation plan. In addition, as part of any bond release application, the applicant shall submit copies of letters which he has sent to adjoining property owners, local governmental bodies, planning agencies and sewage and water treatment authorities or water districts in the districts in which the

suface coal mining and reclamation activities took place, notifying them of his intention to seek release from the bond.

§ 771. *Release of performance bond or deposit—Inspection and evaluation of reclamation work*

Upon receipt of the notification and request, the Department shall within thirty (30) days conduct an inspection and evaluation of the reclamation work involved. Such evaluation shall consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of continuance or future occurrence of such pollution, and the estimated cost of abating such pollution. The Department shall notify the permittee in writing of its decision to release or not to release all or part of the performance bond or deposit within sixty (60) days from the filing of the request, if no public hearing is held and if there has been a public hearing held within thirty (30) days thereafter.

§ 772. *Release of performance bond or deposit—Schedule of releases—Disapproval of application—Protection of affected area*

A. The Department may release in whole or in part the bond or deposit if the Department is satisfied the reclamation covered by the bond or deposit or portion thereof has been accomplished as required by this act according to the following schedule:

1. When the operator completes the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan, the release of sixty percent (60%) of the bond or collateral for the applicable permit area;

2. After revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan. When determining the amount of bond to be released after successful revegetation has been established, the Department shall retain that amount of bond for the re-

vegetated area which would be sufficient for a third party to cover the cost of reestablishing revegetation and for the period specified for operator responsibility of reestablishing revegetation. No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by law. No part of the bond shall be released until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey. When a silt dam is to be retained as a permanent impoundment, the remaining portion of bond may be released under this paragraph so long as provisions for sound future maintenance by the operator or the landowner have been made with the Department; and

3. When the operator has completed successfully all surface coal mining and reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility. No bond shall be fully released until all reclamation requirements of this act are fully met.

B. If the Department disapproves the application for release of the bond or portion thereof, the Department shall notify the permittee in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure said release and allowing opportunity for a public hearing.

C. In order to protect areas affected by surface coal mining activities and the surface effects of underground coal mines, no oil or gas drilling activities shall be commenced or continued in any mine permit area while the reclamation bond or any portion thereof remains in effect, without the written approval of the Director.

The Department shall issue rules and regulations establishing criteria and conditions for the approval of the Director under this subsection.

§ 773. *Release of performance bond or deposit—Notice to municipalities—Objections—Hearings—Informal conference—Authority of department*

A. When any application for total or partial bond re lease is filed with the Department, the Department shall notify any municipality in which a surface coal mining operation is located by certified mail at least thirty (30) days prior to the release of all or a portion of the bond.

B. Any person with a valid legal interest which might be adversely affected by release of the bond or the responsible administration officer of any federal, state or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social or economic impact involved in the operation, or is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objections to the proposed release from bond to the Department within thirty (30) days after the last publication of the above notice. If written objections are filed and a hearing requested, the Department shall inform all the interested parties of the time and place of the hearing, and hold a public hearing in the locality of the surface coal mining operation proposed for bond release within thirty (30) days of the request for such hearing. The date, time and location of such public hearings shall be advertised as frequently as possible by the Department in each issue of a newspaper of general circulation in the locality for two (2) consecutive weeks, and shall hold a public hearing in the locality of the surface coal mining operation proposed for bond release or at the State Capitol Building at the option of the objector within thirty (30) days of the request for such hearing.

C. Without prejudice to the rights of the objectors, to the rights of applicant, or to the responsibilities of the Department pursuant to this section, the Department may establish an informal conference to resolve such written objections.

D. For the purpose of such hearing the Department shall have the authority, pursuant to the Administrative Procedures Act,[1] and is hereby empowered to administer oaths, subpoena witnesses, or written or printed materials, compel the attendance of witnesses, or production of the materials, and take evidence including but not limited to inspections of the land affected and other surface coal mining operations carried on by the applicant in the general vicinty. A verbatim record of each public hearing required by this act shall be made, and a transcript made available on the motion of any party or by order of the Department.

§ 774. *Civil actions to compel compliance with act—Exceptions*

A. Except as provided in subsection B of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act:

1. Against any governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution of the United States which is alleged to be in violation of the provisions of this act or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this act; or

2. Against the Department to the extent permitted by the Eleventh Amendment to the Constitution of the United States where there is alleged a failure of the Department to perform any act or duty under this act which is not discretionary with the Department.

B. No action may be commenced:

1. Under paragraph 1 of subsection A of this section:
   a. prior to sixty (60) days after the plaintiff has given notice in writing of the violation to the Department, and to any alleged violator, or
   b. If the Department has commenced and is diligently prosecuting a civil action in a court of this

state to require compliance with the provisions of this act, or any rule, regulation, order or permit issued pursuant to this act, but in any such action in a court of this state any person may intervene as a matter of right; or

2. Under paragraph 2 of subsection A of this section prior to sixty (60) days after the plaintiff has given notice in writing of such action to the Department, in such manner as the Department shall by regulation prescribe, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

C. Any action respecting a violation of this act or the regulations thereunder may be brought only pursuant to the Administrative Procedures Act[1] and only in the judicial district in which the surface coal mining operation complained of is located.

In such action under this section, the Department, if not a party, may intervene as a matter of right.

D. The court, in issuing any final order in any action brought pursuant to subsection A of this section, may award costs of litigation, including attorney and expert witness fees, to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security.

E. Nothing in this section shall restrict any right which any person, or class of persons, may have under any statute or common law to seek enforcement of any of the provisions of this act and the regulations thereunder, or to seek any other relief including relief against the Department.

F. Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order or permit issued pursuant to this act may bring an action for damages, including reasonable attorney and expert witness fees, only in the judicial district in

which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under Oklahoma Workers' Compensation laws.

§ 775. *Inspection of violations*

Whenever the Department has reason to believe that any person is in violation of any requirement of this act or any permit condition required by this act, the Department shall immediately order inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Department is a result of a previous inspection of such surface coal mining operation. When the inspection results from information provided to the Department by any person, the Department shall notify such person when the inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

§ 776. *Conditions or practices in violation of act—Cessation order—Additional obligations on operator*

If, on the basis of any inspection, the Department determines that any unacceptable condition or practice exists, or that any permittee is in violation of any requirement of this act or any permit condition required by this act, which condition, practice or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, the Department shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice or violation. Such cessation order shall remain in effect until the Department determines that the condition, practice or violation has been abated, or until modified, vacated or terminated by the Department. If the Department finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent

danger to the health or safety of the public or the significant imminent environmental harm to land, air or water resources, the Department shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Department deems necessary to abate the imminent danger or the significant environmental harm.

§ 777. *Abatement of violation—Notice—Hearing—Cessation orders*

If the Department determines that any permittee is in violation of any requirement of this act or any permit condition required by this act, but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air or water resources, the Department shall issue a notice to the permittee or his agent fixing a reasonable time not to exceed ninety (90) days for the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Department, the Department finds that the violation has not been abated, it shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Department determines that the violation has been abated, or until modified, vacated or terminated by the Department. In the order of cessation issued by the Department under this section, the Department shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures to abate in the order.

§ 778. *Suspension or revocation of permit*

If the Department determines that a pattern of violations of any requirements of this act exists or has existed,

and if the Department also finds that such violations are caused by the unwarranted or willful failure of the permittee to comply with any requirements of this act, the Department shall immediately issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Department shall inform all interested parties of the time and place of the hearing. Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked, the Department shall immediately suspend or revoke the permit.

§ 779. *Notices and orders—Requirements*

Notices and orders issued pursuant to Sections 42 through 45 of this act[1], shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Department and all such notices and orders shall be in writing and shall be signed. Any notice or order issued pursuant to this section may be modified, vacated or terminated by the Department. Any notice or order which requires cessation of mining by the operator shall expire within thirty (30) days of actual notice to the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing.

§ 780. *Action for damages and expenses—Injunctions, restraining orders or other orders—Jurisdiction—Relief*

A. The Attorney General, upon request of the Department, shall institute proceedings to recover any damages and expense which the Department may have sustained by reason of the default of the operator. Such proceedings

shall be brought against the operator and surety either in Oklahoma County or the county in which the violation occurred.

The Department may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other appropriate order in the district court for the district in which the surface coal mining and reclamation operation is located or in which the permittee thereof has his principal office, whenever such permittee or his agent:

1. Violates or fails or refuses to comply with any order or decision issued by the Department under this act;

2. Interferes with, hinders or delays the Department in carrying out the provisions of this act;

3. Refuses to admit authorized representatives of the Department to the mine;

4. Refuses to permit inspection of the mine by authorized representatives of the Department;

5. Refuses to furnish any information or report requested by the Department in furtherance of the provisions of this act; or

6. Refuses to permit access to, and copying of, such records as the Department determines necessary in carrying out the provisions of this act.

B. The court shall have jurisdiction to provide such relief as may be appropriate. Any relief granted by the court to enforce an order under paragraph 1 of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this title, unless the district court granting such relief sets it aside or modifies it.

§ 781. *Land unsuitable for certain types of surface coal mining operations—Designation—Criteria*

A. The Department shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any,

land areas of this state are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in this section but such designation shall not prevent the mineral exploration pursuant to this act of any area so designated.

B. Upon petition, the Department shall designate an area as unsuitable for all or certain types of surface coal mining operations if the Department determines that reclamation pursuant to the requirements of this act is not technologically and economically feasible.

C. Upon petition, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will:

1. Be incompatible with existing state or local land use plans or programs;

2. Affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems;

3. Affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

4. Affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

D. Determinations of the unsuitability of land for surface coal mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation processes at the federal, state and local levels.

E. The requirements of this section shall not apply to lands on which surface coal mining operations were being conducted on August 3, 1977, or under a permit issued pursuant to this act or the Coal Reclamation Act of 1978,[1] or

where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

§ 782. *Petition to designate area as unsuitable for surface coal mining operations—Hearing—Decision—Impact statement*

A. Any person having an interest which is or may be adversely affected shall have the right to petition the Department to have an area designated as unsuitable for surface coal mining operations or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten (10) months after receipt of the petition the Department shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this section, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty (60) days after such hearing, the Department shall issue and furnish to the petitioner and any other party to the hearing, a written decision regarding the petition, and the reasons therefor. In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

B. Prior to designating any land areas as unsuitable for surface coal mining operations, the Department shall prepare a detailed statement on the potential coal resources of the area, the demand for coal resources, and the impact of such designation on the environment, the economy and the supply of coal.

§ 783. *Limitations on surface coal mining operations*

After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which existed on August 3, 1977, shall be permitted:

1. Within one hundred (100) feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the Department may permit such roads to be relocated or the area affected to lie within one hundred (100) feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected.

2. Within three hundred (300) feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred (300) feet of any public building, school, church, community or institutional building, public park, or within one hundred (100) feet of a cemetery;

3. Within twenty-five (25) feet plus one and one-half (1½) times the depth of the surface cut from the property line of an adjacent property owner, if the surface cut removes and does not replace lateral support, unless there is written agreement between the operator and the adjacent property owner; or

4. On any land prohibited by federal law.

§ 784. *Cooperative agreements with federal government*

The Department shall have the authority to enter into cooperative agreements with the United States Secretary of the Interior to provide for departmental regulation of surface coal mining and reclamation operations on federal lands within Oklahoma.

§ 785. *Compliance with act*

Every agency, unit, or instrumentality of federal, state or local government, including any publicly owned utility or publicly owned corporation of federal, state, or local government, which proposes to engage in surface coal mining operations which are subject to the requirements of this act shall comply with the provisions of this act.

§ 786. *Review of notices or order or modification, vacation or termination of notices or orders—Application—Investigation—Hearing—Temporary relief—Suspension or revocation of permit—Costs*

A. A permittee issued a notice or order by the Department pursuant to the provisions of this act or any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation or termination of such notice or order, may apply to the Chief Mine Inspector for review of the notice or order within thirty (30) days of receipt thereof or within thirty (30) days of its modification, vacation or termination. Upon receipt of such application, the Chief Mine Inspector shall cause such investigation to be made as it deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the applicant or the person having an interest which is or may be adversely affected, to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation or termination thereof. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

The permittee and other interested persons shall be given written notice of the time and place of the hearing at least five (5) days prior thereto. Any such hearing shall be of record.

B. Upon receiving the report of such investigation, the Chief Mine Inspector shall make findings of fact, and shall issue a written decision, incorporating therein an order vacating, affirming, modifying or terminating the notice or order, or the modification, vacation or termination of such notice or order complained of and incorporate his findings therein. Where the application for review concerns an order for cessation of surface coal mining and reclamation operations issued pursuant to the provisions of this title, the Chief Mine Inspector shall issue the written decision within thirty (30) days of the receipt of the application for re-

view, unless temporary relief has been granted by the Chief Mine Inspector pursuant to this section or by the court.

C. Pending completion of the investigation and hearing required by this section, the applicant may file with the Chief Mine Inspector a written request that the Chief Mine Inspector grant temporary relief from any notice or order issued together with a detailed statement giving reasons for granting such relief. The Chief Mine Inspector shall issue an order or decision granting or denying such relief expeditiously. Where the applicant requests relief from an order for cessation of coal mining and reclamation operations, the order or decision on such a request shall be issued within five (5) days of its receipt. The Chief Mine Inspector may grant such relief, under such conditions as it may prescribe, if:

1. A hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

2. The applicant shows that there is substantial likelihood that the findings of the Chief Mine Inspector will be favorable to him; and

3. Such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resources.

D. Following the issuance of an order to show cause as to why a permit should not be suspended or revoked, the Chief Mine Inspector shall hold a public hearing after giving written notice of the time, place and date. Any such hearing shall be of record. Within sixty (60) days following the public hearing, the Chief Mine Inspector shall issue and furnish to the permittee and all other parties to the hearing a written decision, and the reasons therefor, concerning suspension or revocation of the permit. If the Chief Mine Inspector revokes the permit, the permittee shall immediately cease surface coal mining operations on the permit area and shall complete reclamation within a period specified by the Chief Mine Inspector, or the Chief Mine

Inspector shall declare as forfeited the performance bonds for the operation.

E. Whenever an order is issued under this section, or as a result of any administrative proceeding under this act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses, including attorney fees, as determined by the Chief Mine Inspector to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Chief Mine Inspector, resulting from administrative proceedings, deems proper.

§ 787. *Appeal of order or other action*

Any order or other action of the Department or the Chief Mine Inspector shall be appealable when entered, as provided in Sections 318 et seq. of Title 75 of the Oklahoma Statutes.

§ 788. *Enforcement or protection of interest in water resources—Replacement of water supply*

A. Nothing in this act shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation.

B. The operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution or interruption proximately resulting from such surface coal mine operation.

§ 789. *Rules and regulations*

The Department shall adopt and promulgate all necessary rules and regulations including rules and regulations for hearings and appeals, subject to the provisions of this

act and the Administrative Procedures Act,[1] for the implementation of this act.

§ 790. *Unconstitutionality of Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87)*

If any provisions of this act are required by the Surface Mining Control and Reclamation Act of 1977[1] (P.L. 95-87) and any section, clause or phrase of that Act on which this act is based is declared unconstitutional or invalid by a court having jurisdiction over the State of Oklahoma, the Department may suspend the enforcement of that provision of this act for up to twelve (12) months, and shall immediately notify the President Pro Tempore of the Senate, and the Speaker of the House of Representatives.

§ 791. *Federal rules and regulations—Compliance—Reimbursement for costs*

In compliance with all federal laws, rules and regulations, the Department shall take any such action as it shall deem necessary to make such compliance. The Department shall make every effort to obtain full reimbursement from the Director of the Office of Surface Mining and Reclamation for the costs of performing its duties under this act.

§ 792. *Assistance of state agencies*

The Department is authorized to call upon the expertise of all state agencies in the implementation of this act. All state agencies shall provide any assistance as available on the request of the Department.

[Footnotes omitted in this printing]